

LEGAL RECREATIONS

CURIOSITIES AND
ODDITIES OF THE LAW

FRANKLIN FISKE HEARD



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CURIOSITIES
OF
THE LAW REPORTERS

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AND know, my son, that I would not have thee believe that all which I have said in these books is law, for I will not presume to take this upon me. But of those things that are not law, inquire and learn of my wise masters learned in the law.

LITTLETON.

MOST Prefaces are effectually apologies, and neither the Book nor the Author one jot the better for them. If the Book be good, it will not need an apology ; if bad, it will not bear one: for where a man thinks, by calling himself noddie in the epistle, to atone for shewing himself to be one in the text, he does, with respect to the dignity of an author, but bind up two fools in one cover.

SIR ROGER D'ESTRANGE.



CURIOSITIES OF THE LAW REPORTERS.



R. ROBERT HALE, the father of the Lord Chief Justice, gave up the profession of the law from scruples of conscience, being shocked with legal fictions, — above all, “giving colour in pleading, which, as he thought, was to tell a lie.”¹



YEAR BOOK, 50 Edw. III. fol. 6, pl. 12. This was a case in which a question arose upon a lady's age ; her counsel pressed the court to have her before them, and judge by inspection whether she was within age or not. But “Candish, Justice,” showing great knowledge of female character, says : “ Ill n'ad nul home en Engleterre que puy adjudge a droit deins age on de plein age ; car ascun femes que sont de age de XXX ans voient apperer d'age de XVIII ans.”

¹ Burnet's Life of Hale, p. 2.

IN *Jones v. Marsh*, Cas. Temp. Talb. 64, the case of *Parstow v. Weedon*, 1 Abr. Eq. Cas. 149, was cited. But the Lord Chancellor said that Mr. Vernon had always grumbled at the determination of that case, and never forgave it the Lord Macclesfield, saying it was contrary to the constant practice of the court.



BY St. Geo. IV. ch. 71, it is enacted that “If any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or *other cattle*,” such person or persons are made liable to a penalty not exceeding £5, nor less than 10s. In *Ex parte Hill*,¹ Starkie and Holroyd contended before Bayley, J., that the bull was included in the statute under the term “other cattle.” Curwood, contra, argued, that it was a rule in the construction of Acts of Parliament, that where there was an enumeration beginning with the lower degrees, and general words embracing others ejusdem generis at the end, these general words did not include a superior degree which was not named in the Act; and he cited the case of the Archbishop of Canterbury,² where it was held, on the statute 13 Eliz. ch. 10, which mentions deans and chapters, parsons and vicars, and *all other persons whatsoever having spiritual promotion*, that the words did not

¹ 3 C. & P. 225.

² 2 Rep. 46.

extend to bishops, a superior order, who were not named therein; and he contended, therefore, that as, in the statute in question, the enumeration began with ox, cow, and heifer, omitting bull, and concluded with other cattle, it did not include a bull, the bull and the bishop standing in *pari statu* with reference to the words of those statutes respectively.



“THE books contain the maxim, *Via trita, via tuta*. I do not know that this has yet been alleged as a reason for not repairing a highway. But it would make as good a defence as many I have heard.”¹



IN *March on Slander*, A. D. 1648, it is said, with reference to the encouragement of actions of slander, “Though the tongues of men be set on fire, I know no reason wherefore the law should be used as bellows to blow the coals.”



THE Star Chamber decided that they might punish the undue preparation of witnesses, though their testimony be true.²

¹ *Scintillae Juris*, p. 103.

² *Darcy v. Leigh*, Hobart, 324.

MR. JUSTICE CROMPTON recently¹ gave this brief description of Sir John Fenwick's Case:² "The House of Commons were unable to impeach Sir John Fenwick of high treason because there was only one witness against him, the other having been spirited away; but they and the Lords passed a bill of attainder to cut off his head on the evidence of one."



LORD CAMPBELL mentions that Lord Erskine, when Lord Chancellor, in one of his judgments observed: "Lord Coke considers the word 'lunaticus' as by no means material, classing it with 'amens' and 'demens,' and there is no doubt that the moon has no influence over lunatics; and he notices that Vesey Jun., the reporter, represents this as a point decided by Lord Erskine, and writes this marginal note: 'In cases of lunacy, the notion that the moon has an influence erroneous.'" ³



THE case of *Lillecott v. Compton*, reported by Vernon,⁴ merits commendation for the brevity with which the reporter gives the whole case in a single line:—

"Plate shall pass by a devise of household goods."

¹ *Regina v. Boyes*, 1 Best & Smith, p. 324.

² 13 Howell State Trials, 528.

³ *Crammer, Ex parte*, 12 Ves. 445, 450.

⁴ Vol. II. p. 638. — 60 Penn. State Rep. 223.

“**R**EPORTS and Pleas of Assizes at Yorke,” by John Clayton, is the title of a very thin duodecimo published in 1651. “If this book,” writes Mr. Allibone, “will do all that Mr. Clayton promises for it, we should suppose that our friends the lawyers would insist on its immediate republication.” — “You may see here how to avoid a dangerous jury to your client, what evidence best to use for him, how to keep the judge so he overrule you not; so that, if it be not your own fault, — as too often it is for fear of favor, — the client may have his cause so handled as, if he be plaintiff, he may have his right, and if defendant, moderately punished, or recompensed for his vexation; and such pleaders the people need.” — Preface.



CERTAIN rules of evidence which are now considered fundamental, appear to have been altogether unknown in the seventeenth century. In the trial of Mr. Hawkins, a clergyman, for stealing money and a ring from Henry Larimore, in September 1668, Lord Hale admitted evidence to show he had once stolen a pair of boots from a man called Chilton, and that, more than a year before, he had picked the pocket of one Noble. In summing up, Lord Hale said, after referring to the cases of Chilton and Noble: “This, if true, would render the prisoner now at the bar obnoxious to any jury.”¹

¹ 6 Howell State Trials, 935.

SAUNDERS thus concludes his report of the case of the Dean, etc. of Windsor *v.* Gover :¹ “Sed non allocatur. For this fault alone judgment was given against the defendant by Twisden, Raynsford, and Morton, Justices (Kelynge, Chief Justice, being absent), who said that the plea in this point was altogether insensible. But I believe their principal reason was, because they would not determine the matter of law.”



LORD JUSTICE KNIGHT BRUCE, at the conclusion of the argument of a case containing a long statement of facts, summed them up in ten lines, and concluded thus : “This is the whole case, as it appears to me, spread as it has been, and as lawyers do spread it, and as lawyers sometimes cannot help spreading it, over a multitude of sheets of paper.”²



THE statute 1 Edw. II. enacts that a prisoner who breaks prison is guilty of felony ; but if the prison be on fire, this is not so, “for he is not to be hanged because he would not stay to be burnt.”³

¹ 2 Saund. 305 c, 6th ed.

² In re The German Mining Co., 19 Eng. Law & Eq. Rep. 594, 595.

³ Plowden, 13.

STYLE, the reporter, from his own account,¹ would seem to have been careful about what he put into his book as decided. In one case,² after mentioning that Chief Justice Glyn “argued long, much to the same effect as formerly,” he apologizes for not giving his argument, by saying that, “having taken cold,” he could not “distinctly hear him.” He does not, however, make any excuse in the case of *Weld v. Runney*,³ where he reports an argument as made by Twisden, at the Bar, in 1650, which Twisden himself, when on the Bench, about twenty years afterwards, said, was “not one word of it true.”⁴



SIR CRESSWELL LEVINZ, Attorney-General of Charles II., gave an opinion, as law officer of the Crown, upon the mode of trying the question whether certain imported “earthenwares be painted or not”; and the granting of a monopoly for “a new invention of making black pepper white.”⁵



LORD BACON, long ago, pointed out that “more doubts rise upon our Statutes, which are a text law, than upon the Common Law, which is no text law.”

¹ Style, 470.

² *The Protector v. Buckner*, Style, p. 470.

³ Style, 318.

⁴ 1 Mod. 296.

⁵ 2 Chalmers's Opinions, 284, 320.

IT is recorded of the saints of the Republic, that, in reciting the Lord's Prayer, they would never say "Thy kingdom come," but always "Thy commonwealth come." From a similar spirit, probably, though with better sense, the Court of King's Bench was styled during the time of Style's and Aley's Reports the Upper, or Public Bench.¹



"ACCORDING to the best English writers," said Baron Alderson,² "the word 'inventory' includes a description of a person as well as of those parts of his dress or other matters which are particularly specified. Thus Shakespeare speaks of a lady being inventoried: 'I will give out divers schedules of my beauty: it shall be inventoried, and every particle and utensil labelled to my will.'"³



IN "The Epistle to the Reader," the editor of Goldsborough, in 1653, while language was yet more nervous than polite, says: "For thy further satisfaction know, that thou hast not here a deformed brat, falsely fathered upon the name of a dead man,—too usual a trick played by the subtile gamester of this serpentine age."

¹ For this passage, I am indebted to Mr. Wallace. The Reporters, 200, 3d ed.

² Taylor v. Bullen, 5 Exch. p. 786.

³ Twelfth Night. Act I. Scene 5.

IN a recent case in the House of Lords,¹ counsel argued thus: "It is difficult to suppose any species of profits which the phrase 'certain and uncertain profits' would not comprehend. Like Sinclair's well-known division of sleeping into two sorts, namely, sleeping with or sleeping without a nightcap, it would seem to exhaust the subject."



IN 1835 David Gibbons, "Esquire of the Middle Temple, Special Pleader," published "A Treatise on the Law of Limitation and Prescription." This is the motto on his title-page:—

"My Galli-gaskins, that have long withstood
The winter's fury, and encroaching frosts
By TIME subdued (what will not Time subdue ?)"

J. PHILLIPS'S *Splendid Shilling*.



LORD ELLENBOROUGH was puzzled to decide whether the letter "s" was a fatal variance in this case: A declaration alleged that the defendants, a partnership firm, made a bill of exchange, "their own *hands* being thereto subscribed." The difficulty was that the word "hand" was in the plural. But he refused to nonsuit.²

¹ Repton v. Hodgson, 3 House of Lords Cases, p. 79.

² Jones v. Mars, 2 Campb. 395.

WHEN Littleton prayed judgment in a quare impedit, Year Book, Mich. 35. Hen. VI., Prisot, Chief Justice, protested: "I marvel mightily that you are so hasty in this matter; for it is a weighty matter; and I have seen similar matters pending for twelve years; and this matter has been pending only three quarters of a year."



TO his report of the case of *Wheatley v. Lane*,¹ Saunders appends this characteristic "note": "It was argued twice, and much debated, and I believe is now settled: but the conveniences or inconveniences which may follow are not yet known."



IN the *Liber Assissarum*, p. 177, is a case in which Thomas de Setone, one of the judges of the Common Pleas, in 30 Edw. III. recovered damages from a woman for calling him "traitor, felon, and robber" in the public court.



IN a case in 4 Leonard, 198, "a point of law is agreed by the court, and affirmed by the clerks."²

¹ 1 Saund. 219.

² Compare Bacon, Essay LVI. "Of Judicature": "An ancient clerk, skilful in precedents, wary in proceedings, and understanding in the business of the court, is an excellent finger of a court; and doth many times point the way to the judge himself."

PLOWDEN says the reporters deliberated upon doubtful resolutions. If the progeny were rickety, or likely to prove mischievous, they smothered it. It is matter of regret that a similar course is not pursued by the reporters of the present day. If it were, the "books of Reports" would be materially reduced in size.



THE judgment in a very recent leading case¹ in the Court of Exchequer Chamber concludes thus tersely: "In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and, so far as it rests on principle, fails in reason."



A widow shall have house-room, and meat, and drink in common for forty days; but she may not kill a bullock within those forty days after the death of her husband, in which time her dower ought to be assigned her.²



ACCORDING to Bracton's description of arson, this crime was committed "when any one from turbulent sedition wickedly and feloniously made a conflagration."³

¹ *Redhead v. Midland Railway Company*, 9 Best & Smith, 538.

² *Noy Maxims*, 27.

³ Ch. XXIV. fol. 11.

THERE is a celebrated passage from one of Lord Plunket's speeches, relative to the Statutes of Limitation. "If time," says his lordship, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the law-giver has placed an hourglass, by which he metes out incessantly those portions of duration which render needless the evidence that he has swept away." This passage has been variously rendered in different publications. In the case of *Malone v. O'Connor*,¹ Chancellor Napier cited it as follows: "Time, with the one hand, mows down the muniments of our titles; with the other, he metes out the portions of duration which render these muniments no longer necessary." This version is probably more accurate than any other, as it was furnished to the Chancellor by one of the counsel in the *quare impedit*, on the trial of which Lord Plunket made use of the imagery in his address to the jury.²



FEAR, fraud, and flattery: three unfit accidents to be at the making of a will.³

¹ *Drury Cases in Chanc. Temp. Napier*, 644.

² "Statesmen of the Time of George III." by Lord Brougham, 3d Series, p. 227 note. 1 *Taylor Ev.* § 67, 5th ed.

³ *Noy Maxims*, 97.

HAWKSHEAD, in his Essay on Wills, p. 335, relates this case: "I was once in the court of King's Bench, when one of the counsel was making a motion upon an affidavit filled with matters of account and calculations of figures, which he was detailing to the judges, who rose, and one of them said (interrupting him), This court does not sit here as accountants; and they retired."



LORD TENTERDEN C. J. refused an amendment of a variance which, according to the marginal note of the reporter, "would not have occurred if common care had been taken in the drawing of the declaration;"¹ thus sacrificing the suitor for the sake of punishing the attorney.



IN Croke Temp. Eliz. is this case: A poor man found a priest too familiar with his wife, and because he spake it abroad and could not prove it, the priest sued him for defamation.



A FAMILIAR maxim is thus tersely expressed: "He that hath committed iniquity shall not have equity."²

¹ Jelf v. Oriel, 4 C. & P. 22.

² Francis Maxims, 5.

FROM the rare and interesting volume entitled "Choyce Cases in Chancery," ed. 1672, we print a few of the "Choyce Cases." As an exhibition of Elizabethan habits, manners, and peculiarities, they are quite instructive.



COSTS against the clerk for mistaking the subpoena. The defendant was dismissed for want of a bill, and forty shillings given him; whereupon he bespake the subpoena for costs, and Robert Bailes, clerk, made the subpoena ad comparend., which being served, the other appeared and got costs, both which costs were discharged, and ordered that the plaintiff may have a subpoena against the said clerk, Robert Bailes, for the costs. Fairbanck, plaintiff. Domina Metham, defendant. Anno 21 et 22 Eliz.¹



MANTEL, one of the defendants, maketh oath that his wife hath a young child sucking upon her, without whom he cannot directly answer. And that the other defendant is an infant under the age of twenty-one years. Therefore they are respited for answer until Trinity Term next.²



SUTTON, plaintiff, Eringto, defendant, a suit upon a promise, and twelve pence accepted in consideration, referred to the common law.³

¹ Choyce Cases, p. 133.

² Ibid. p. 120.

³ Ibid. p. 140.

PARISHIONERS sue their parson at every year's end to give a rye loaf and a red herring. The suit was on behalf of the parishioners, *as well rich as poor*, for and concerning the yearly alms or distribution supposed to be due, by the parson of the said parish, of a rye loaf and a red herring to every parishioner on St. Andrew's Eve. But that it appears by a record in the Exchequer, setting down the value of the said parsonage, that there is 13*s.* 4*d.* yearly to be distributed in victuals at the same time to *the poor* of that parish, but not to the *gentlemen and men of ability*. And for that the defendant offered to give yearly 26*s.* 8*d.* in lieu of the said 13*s.* 4*d.* to the poor of the said parish, who stand in need thereof, therefore day is given to the plaintiffs to show cause why they should not accept thereof, or be dismissed. And after assent 40*s.* a year was decreed yearly to the poor. Elmer and Smith, Church-wardens of Northwold in the County of Norfolk, plaintiffs; Scot, parson, of the same town, defendant. Anno 24 Eliz.¹



THE plaintiff put in a replication of two skins of parchment of frivolous matter, and not fit to be rejoined unto, of purpose to put the defendant to unnecessary charges, and therefore Master Godfry, being of counsel with the defendants, desired his client might not be compelled to put in a rejoinder, but that they may go to commission with the same, and ordered accordingly.²

¹ Choyce Cases in Chancery, p. 155.

² *Ibid.* p. 157.

THE sheriff upon an attachment returned cepi corpus et languidus in prisiona. Whereupon a duces tecum was awarded; and thereupon the sheriff returned adhuc languidus. Forasmuch as Walter Williams made an oath that the defendant neither at the time of the return, nor now, is so sick but that he goeth abroad, therefore the sheriff is amerced five pounds for his false return.¹



LORD CAMPBELL in his "Life of Lord Lyndhurst," thus relates how a case in the House of Lords, involving an important question, was decided: "In the case of *Johnstone v. Beattie*,² a great difficulty arose from our being equally divided, and a fifth law lord, who did not usually attend the hearing in appeals, was called in to make a majority. A domiciled Scotchman, of large landed estate in Scotland, without any property in England, married to a Scotch woman, had by her an only child, a daughter, for whom, before his death, he duly appointed tutors and curators, domiciled in Scotland, who were confirmed by the Supreme Court in Scotland, and who by the law of Scotland were entitled to the guardianship of her person and the management of her property. Some years after the death of both parents, she, while still an infant, happened casually to be in England; whereupon certain parties, wishing

¹ Choyce Cases in Chancery, p. 115.

² 10 Clark & Finnelly, 42.

to obtain possession of her and to supersede the Scotch tutors and curators, who had acted unexceptionably in the guardianship of her person and her property since her father's death, filed a bill in chancery alleging falsely (as was admitted) that she had property in England, and praying that one of them might be appointed her guardian, and that the Scotch tutors and curators should account to the English guardian for all the rents and profits of the Scotch estates. The Vice-Chancellor, the facts being laid before him, made an order to that effect, and this was affirmed by Lord Chancellor Lyndhurst. Upon an appeal to the House of Lords, the order appeared to Lord Brougham and to myself not only absurd, but contrary to the law of England; while Lords Lyndhurst and Cottenham considered the proceeding as a matter quite of course and highly laudable, although they allowed that the person and property of the infant would henceforth be under the control of the English guardian, and that during her minority she would not without his consent be allowed to marry or to return to her native country. Lord Langdale, Master of the Rolls, being called in, after an argument in his hearing, declared himself of the same opinion. *This was a most lamentable, but by no means singular, instance of the narrow-mindedness of English lawyers.* Here three very able men, competent to form a sound conclusion upon any subject to which logical reasoning and common sense are to be applied,

were satisfied with this order, because it is laid down in the books of practice that, as soon as a bill is filed to make an infant a ward of the court, the infant is a ward of the court, and a guardian ought to be appointed, — so that any foreign child, male or female, brought to England for a few weeks or days, with a view to health or education or amusement, may be made a ward of Chancery and imprisoned in England till twenty-one. I did not much wonder at Cottenham and Langdale countenancing such nonsense, as they had never been freed from the trammels of the Equity draughtsman's office in which they learned to draw bills and answers; but when I found that the masculine and enlightened mind of Lyndhurst did not revolt at it, I was filled with astonishment as well as dismay. The truth, I believe, was, that he had committed himself by affirming as Chancellor, *more suo*, without much considering whether the order appealed from was right or wrong."



THE commencement of the preface to the third volume of *Modern Reports*, p. xiv, is curious:

"GENTLEMEN, — All human laws are natural or civil." "This puts us in mind," says a very recent writer, "of a humorous introduction to death, which we have somewhere read: —

‘Death is common to all.

It occurs but once.’ ”¹

¹ Woolrych *Lives of Eminent Serjeants*, Vol. I. p. 97 note.

IT seems that counsel had been assigned to *advise* with Algernon Sidney, although they were not allowed to address the court. When Bamfield, one of these, rose as *amicus curiæ*, and suggested in arrest of judgment that there was a material defect in the indictment, the Lord Chief Justice blandly observed, "We have heard of it already; we thank you for your friendship, and are satisfied." He then proceeded to pass sentence of death upon the prisoner.¹



THE royal fish are whales and sturgeons, which, when either cast ashore or caught near the coast, belong to the Crown. Blackstone notices a curious distinction made by the old legal authorities, which is that the whale is to be divided between the King and the Queen, the King taking the head and the Queen the tail; the reason assigned being, that the Queen might have the whalebone for her wardrobe, although in fact the whalebone is found in the head, and not in the tail.²



IN Tremaine's "*Placita Corone*," p. 261, is a precedent of an indictment against a counsellor, for betraying his client's cause and taking fees of the other side.

¹ 9 Howell State Trials, 901.

² Forsyth Constitutional Law, 178.

IN his judgment in *Moens v. Heyworth*,¹ Baron Alderson observed: "I consider that if a person makes a representation, or takes an oath, of that which is true, if he intend that the party to whom the representation is made, should not believe it to be true, that is a false representation; and so he who takes an oath in one sense knowing it to be administered to him in another, takes it falsely. This may be illustrated by an anecdote of a very eminent ambassador, Sir Henry Wotton, who, when he was asked what advice he would give to a young diplomatist going to a foreign court, said, 'I have found it best always to tell the truth, as they will never believe anything an ambassador says; so you are sure to take them in.' Now Sir Henry Wotton meant that he should tell a lie. This, no doubt, was only said as a witticism, but it illustrates my meaning."



IN *Montrion v. Jefferies*,² Abbott C. J. in summing up said: "No attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law."



THERE is an idiom in truth which falsehood never can imitate.³

¹ 10 M. & W. 158, 159.

² 2 C. & P. p. 116.

³ Lord Chancellor Napier in *Low v. Holmes*, Drury Cases in Chanc. Temp. Napier, 323.

IN *Sims v. The State*,¹ which was an indictment for larceny, the court charged the jury thus: "Gentlemen of the jury, if you believe the evidence, you will find the defendant guilty." To this charge the prisoner very properly excepted. The court then said to the jury: "*Go along, and find the defendant guilty.*" On error the judgment was reversed, the Chief Justice saying, "The remark made to the jury after the charge was given was, to say the least of it, a great violation of judicial propriety, and no doubt had an influence with the jury, that did or might well have prejudiced the prisoner." We think no one will presume to question this conclusion of the learned court.



LORD HARDWICKE says² that Lord Holt himself took exceptions to the indictment in the case of *Rex v. Keite*,³ in order to avoid the question whether a venire de novo may issue, in a case of felony, for a defective verdict.⁴



LORD HOBART remarked that special demurrers "exist that law may be an art."

¹ 41 Alabama, 23.

² *Rex v. Burridge*, 3 P. Wins. p. 499.

³ *Rex v. Keite*, 1 Ld. Raym. p. 144.

⁴ Judgment in *Campbell v. The Queen*, 11 Q. B. p. 839.

MR. JUSTICE HUTTON charged the grand jury at Northampton, with regard to ship-money. Thomas Harrison, a clergyman of that county, foolishly taking umbrage at this charge, and, “while the courts of Common Pleas, King’s Bench, and Chancery were sitting, rushed to the bar of the Common Pleas, in the presence and audience of the justices there sitting,” and cried out in a loud voice, “I do accuse Mr. Justice Hutton of high treason.” He soon suffered for his temerity. He was indicted for the offence, and was fined £5000 and imprisoned, and required to make his submission in all the courts at Westminster. The only point of the case which does not tell to the credit of the judge is, according to his own report,¹ that he also brought an action for damages against Harrison, and recovered £10,000.²



IN “The Practice Unfolded” of the High Court of Chancery, pp. 31, 32, ed. 1672, are two cases which are models of accuracy and brevity :—

Warwick Hospital contra Feilding, M. 9. Jac., the Lord Chancellor Ellesmere said that churches and hospitals lightly go down by trials in the country, therefore stayed by injunction.

Hill. 9. Jac., Duncumbe contra Randall, 8. Actions at law for one cause. Lord Egerton : This is barratry ; stay them all by injunction.

¹ Hutton, 131.

² Cro. Car. 503.

LORD RAYMOND thus concludes the report of the case of the Bishop of St. David's *v.* Lucey, which was a case of prohibition clearly within the jurisdiction of the House of Lords: "Note, that Holt, Chief Justice, told me, that if the Lords had been of opinion that the prohibition ought to have been granted, he never would have granted it."¹



THE widow shall have all her apparel, her bed, her copher, her chains, borders, and jewels, by the honourable custom of the realm, except her husband unkindly give any of them away. Or be it in debt, that it cannot be paid without her bed, etc. yet she shall have her necessary apparel.²



IT is said that the king can never be nonsuit; and does not appear by his attorney, as other men do, "for in contemplation of law," says Blackstone, "he is always present in court."³



IN *Ex parte Davis*,⁴ the agreement in controversy, which was in the form of a bond, was designated by the Lord Chancellor, Lord Westbury, as "an ingenious piece of mechanism."

¹ 1 Ld. Raym. 515.

² *Noy Maxims*, 108.

³ *Comm.* Vol. I. p. 270.

⁴ 9 Jur. N. S. 859, 861.

THE great sinecure of Chief Clerk of the Court of King's Bench, compensated by a pension of £9000 a year, falling vacant, Sir John Holt granted it to his brother Roland, and the question arose whether the patronage of it belonged to the Chief Justice or the King. This came on to be tried by a trial at bar before the three Puisne Judges and a jury. A chair was placed on the floor of the court for Lord Chief Justice Holt, on which he sat uncovered near his counsel. It was proved that the Chief Justices of the King's Bench had appointed to the office from the earliest times, till a patent was granted irregularly by Charles II. to his natural son, the Duke of Grafton; and there was a verdict against the Crown, which was confirmed, on appeal, by the House of Lords.¹



IN a bastardy case, Mr. Justice Emery speaks of a certain statute as "an experiment to do some justice to an unoffending being, brought into the world by the ardent original efficiency of man, not under the sanction of the marriage covenant."²



SAVILE'S REPORTS. An accomplished legal bibliographer says that "this book seems to be pretty much in the condition of Pope's 'most women,' and to have 'no character at all.'"

¹ *Bridgman v. Holt*, Shower P. C. 111. *Skinner*, 354. *Regina v. Suffolk*, 18 Q. B. 420.

² *Woodward v. Shaw*, 18 Maine, 308.

IN *Wright v. Crump*,¹ Holt C. J. states the case of the mayor of Hereford, who claimed title to a house in Hereford, where a court was held, *and he by charter was sole judge of the court*. In order to recover the house, he made a lease of it to A., that A. might bring ejectment before him. A. did so, and the mayor, says Lord Holt, “in effect, was judge in his own cause, and he gave judgment for his own lessee”; and upon complaint in this matter, in the King’s Bench, the court granted an attachment, and the mayor was laid by the heels;² though it is said by one of the reporters, “he got off the easier for that he had been an old cavalier.”³



NO wonder that Bacon should have commended “the excellent brevity of the old Scots acts.” Here is a specimen, an actual statute at large, comprehensive, and worth a small library of modern statute-books, if it was duly enforced: “Item, it is statute and ordained, that all our Sovereign lord’s lieges being under his obeisance, and especially the isles, be ruled by our Sovereign lord’s own laws, and the common laws of the realm, and none other laws.”

¹ 2 Ed. Raym. 706. ¹ Salk. 201. ⁶ Cush. 332.

² To “lay by the heels” was the technical expression for committing to prison. The Chief Justice says to Falstaff: “To punish you *by the heels* would amend the attention of your ears; and I care not if I do become your physician.” — *Second Part of King Henry IV.* Act I. Scene 2.

³ 7 Mod. 4. 7 Mass. 299.

READ *v. Legard* was an action brought for necessities supplied to the defendant's wife at a time when he was confined in an asylum as a dangerous lunatic. In the course of the argument, Alderson, B., inquired of the plaintiff's counsel if they should not apply to the Court of Chancery for relief. They replied: "While the grass is growing, the steed starves; while the Court of Chancery is deciding the cause, the woman might starve." The court decided that the action could be maintained.¹



CHIEF JUSTICE SHEPLEY, of Maine, thus concludes an elaborate opinion:—

"Upon the construction of this will there have been, it is said, different opinions and doubts among members of the profession for thirty years. If it be so, it may not have been wholly without a precedent; for Lord Eldon commences his opinion in the case of *Earl of Radnor v. Shafto*, 11 Ves. 453, with the remark: 'Having had doubts upon this will for twenty years, there can be no use in taking more time to consider it.'

"With the best light to be obtained by a more limited consideration and examination, the Court has come to a very satisfactory conclusion respecting the correct construction of the devise to Othiel Pratt."²

¹ 15 Jur. 494. See *Shaw v. Thompson*, 16 Pick. 198, 200.

² *Pratt v. Leadbetter*, 38 Maine, 17.

SOUTHOLD brought an action against Daunston for speaking these words: "Southold hath been in bed with Dorchester's wife," whereby he lost his marriage. Serjeant Bing moved unsuccessfully that these words are not actionable; for it may be he was in bed with her when he was a child, she being his nurse, or it may be that her husband was in bed betwixt them; and words shall be taken in mitiori sensu when any construction can be made to help it. "But Jones and myself conceived," says Croke, "that such foreign intendments as have been alleged shall not be taken, but it shall be adjudged *ex effectu dicendi*, which is here to hinder him of his marriage, as it is now found by the verdict; but they would advise thereof. And it was afterwards adjudged for the plaintiff.¹



MR. JUSTICE RICHARDSON, in delivering the opinion in a case² relating to justices of the peace, said: "Though I cannot add with the good Prior (speaking of women) —

" 'Let all their ways be unconfined,'

yet I will say with him, —

" 'Be to their faults a little blind,

And to their virtues very kind.' "³

¹ Southold v. Daunston, Cro. Car. 269.

² Reid v. Hood, 2 Nott & McCord, p. 172.

³ Another reading of this passage which is quoted from "An English Padlock," is this: —

" Be to her virtues very kind;

Be to her faults a little blind."

AN old decision is thus stated by Hon. William M. Evarts:¹ "The Year-Book contains the following story: It seems that somebody had been so rude as to call a clergyman a fool, with a prefixed expletive, which gave point to the stigma wrung from the arsenals of theological denunciation, and not from the technical words of the law. Now, in an action of slander, the point came up distinctly, — for, without special damage proved, we hold such words injurious only when they injure the party spoken of in his profession, — and the court held that it was not actionable, for it did not injure the clergyman in his profession. But the court said that had it been of the lawyer, or of the medical profession, it would have been otherwise. Or, as the old law French more tersely has it, *Parce que on peut estre bon parson et grand fou; d'un attorney aliter.*"



IN *Riddle v. Welden*² it was decided that the goods of a boarder are not liable to be distrained for rent due by the keeper of a boarding-house. Chief Justice Gibson, in delivering the opinion of the court, said that Falstaff "speaks with legal precision when he demands, 'Shall I not take mine ease in mine inn!'"

¹ American Law Review, Vol. III. p. 343.

² 5 Wharton, 15.

IN a recent case¹ the Court of Queen's Bench were called upon to give a judicial construction to the word "team." In the course of the argument, Mr. Justice Blackburn cited Wordsworth's use of the word : —

"Yes, let my master fume and fret,
Here am I, with my horses yet !
My jolly *Team*, he finds that ye
Will work for nobody but me."

The Waggoner, Canto I.

And also Shakespeare's. He describes Queen Mab as "drawn with a *team* of little atomies."² — *Roméo and Juliet*. Act I. Scene 4.

And Mr. Justice Crompton cited the following old epigram : —

"Giles Jolt, as sleeping in his cart he lay,
Some waggish pilfrers stole his *team* away.
Giles wakes and cries, 'What 's here, odds Dickens ! what ?
Why, how now, am I Giles or am I not ?
If he, I've lost six geldings to my smart ;
If not, odds budlikins ! I've found a cart.'"

Elegant Extracts, Vol. IV. p. 296. London, 1791.

And in his judgment he said : "It is not made out to my satisfaction that the word 'team' implies, besides horses, a cart or vehicle of some kind. I think that according to the modern use of the word it does not. Thus you speak of the team a man

¹ Duke of Marlborough v. Osborn, 5 Best & Smith, 67 (1861).

² It was said at the bar, that "a team of counsel means a number of counsel following one after another."

worked a coach with, and if the word 'team' were confined to lines of animals, a line of pigs would afford a ludicrous instance."



BY St. Westminster the First, 3 Edw. II. A. D. 1276, the time of memory was limited to the reign of Richard I. July 6, 1189. "And for all practical purposes," said Mr. Justice Wilde,¹ "it might as well be reckoned from the time of the creation." But in 1868 this limitation was practically applied in a well-considered case in the Court of Exchequer Chamber. "The true principle of the law applicable to this question," said Kelly C. B., "is, that when a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory, that is, from the reign of Richard I. to the present time, unless the contrary is proved. In this case, the right to these fees may have had a legal origin before the time of memory; and the evidence that they have been taken in modern times, during a period of nearly fifty years, leads to the presumption that they were lawfully taken in the time of Richard I. unless the payment at that time be disproved."²

¹ *Coolidge v. Learned*, 8 Pick. p. 508.

² *Bryant v. Foot*, Law Rep. 3 Q. B. 497, 505. See the admirable judgment of Mr. Justice Keating, p. 512.

IN 1772 Lord Mansfield decided that there was no property in slaves, and in answer to the plea of the vast property, amounting to millions, at issue on the question, he uttered the memorable maxim: "*Fiat Justitia ruat Cælum.*"¹ In 1768, in an equally celebrated case, he made use of the same maxim.²

Sir Thomas Browne has, in his "*Religio Medici*,"³ A. D. 1642, "*Ruat cælum fiat voluntas tua.*" A recent writer⁴ says the phrase used by Lord Mansfield is found in Ward's "*Simple Cobbler of Aggawam in America*," the first edition of which was printed in 1645.



IN *The Queen v. Tutehin*,⁵ Powys J. and Gould J. having delivered opinions one way, and Powell J. and Holt C. J. the other, the report concludes with this note: "*Powys J. recanted instanter, and Gould J. hæsitabat.*"



FILOW'S Case, Year-Book, 12 Hen. VIII. 3, pl. 3. Eliot J. went so far in his depreciation of dogs, as to lay down that dogs are vermin, and for that reason the Church would not debase by taking tithes of them.⁶

¹ *Somer-set's Case*, Loftt. p. 17.

² *The King v. Wilkes*, 4 Burrow, p. 2562.

³ Part Second, Sec. XI.

⁴ Bartlett. *Familiar Quotations*, p. 589, 5th ed.

⁵ 6 Mod. p. 287.

⁶ 1 Smith L. C. 395, 6th London ed.

PLEAS in abatement "should be certain to every intent, and be pleaded without any repugnancy." When a party resorts to the technicalities of the law, he must take special care that he omits none. "Let him who objects to informality in the proceedings of his opponents," remarks Richardson, C. J., in *Clarke v. Brown*, 6 N. H. 435, "be himself in correct form." Neither in such case is the scriptural injunction inapplicable, — "Wherefore let him that thinketh he standeth take heed lest he fall." — 1 Cor. x. 12.¹



IN a case in the Year-book, 38 Edw. III. pl. 14, the House of Lords commanded the Court of Common Pleas to give a judgment. The Chief Justice refused. Afterwards, in his absence, the others complied, and gave judgment. The Court of King's Bench afterwards examined the proceedings of the House of Lords, and adjudged them void.²



IN "The Practice Unfolded" of the High Court of Chancery, ed. 1672, p. 41, is this case: A vexatious plaintiff *in formâ pauperis*, and not able to pay costs upon the dismissal, hath been ordered by the Lord Egerton to be whipped, upon the equity of the St. 23 Hen. VIII. cap. 15, and no more to be admitted *in formâ pauperis*.

¹ Getchell v. Boyd. 44 Maine, 484.

² 12 Mod. p. 65.

YEAR-BOOK, Mich. 10 Hen. VI. fol. 8 b, pl. 30 (A. D. 1431). The Prior of W. brings writ on the Statute of Labourers against a chaplain for not chanting the mass. Strangeways J.: "The writ is not maintainable by the statute; for you cannot *compel a chaplain to sing in mass*; for that at one time he is disposed to sing it, and at another not; wherefore you cannot compel him by the statute." This case was commented on by some of the judges in the celebrated case of *Lumley v. Gye*.¹ The plaintiff, the proprietor of the Queen's Theatre, had contracted with Johanna Wagner, a celebrated opera-singer, to sing in the theatre for a certain time, with a condition that she should not sing elsewhere during the term without the plaintiff's consent in writing. The question was, whether the plaintiff could maintain an action against the proprietor of another theatre, who maliciously procured Miss Wagner to abandon her contract entirely. And a majority of the Court of Queen's Bench held that the action would lie. The judgment was delivered in June 1853. In the previous April the plaintiff filed a bill against Miss Wagner, to restrain her from singing at Gye's theatre.² At this time Lord St. Leonards held the Great Seal. His lordship decided that the two positive and negative stipulations in the contract above named constituted only one contract, and that

¹ 2 H. & Bl. 216.

² *Lumley v. Wagner*, 1 De Gex, Macnaghten & Gordon, 601, 619.

the court could not enforce performance of the *whole* contract. "It is true," said the astute Chancellor, "that I have not the means of *compelling the lady to sing*; but she has no cause of complaint if I compel her by injunction to abstain from the commission of an act which she has bound herself not to do, and thus, possibly, *compel her to perform her engagement*."



IN England, the celebrated Ann, countess of Pembroke, had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes at Appleby, she sat with the judges on the bench.¹



DEBITORES non presumuntur donare. "Yet debtors do make gifts, and large ones; often giving away the whole of their estates. I have noticed that bankrupts are men of very tender affections where their relations are concerned; and they are so far unprejudiced that they often *prefer* a creditor." — Scintillae Juris, p. 102.



IN case for words which imported the committing of adultery by the plaintiff with Jane at Stile, the defendant, in mitigation of damages, may give in evidence, that the plaintiff committed adultery with Jane at Stile, but not with any other woman.²

¹ Co. Litt. 326 a, note, 19th ed.

² Smithies v. Dr. Harrison, 1 Ld. Raym. 727.

LORD COKE, in his "Fourth Institute," commenting on the jurisdiction and power of justices of the peace, says, "It is such a form of subordinate government for the tranquillity and quiet of the realm as no part of the Christian world hath the like, if the same be duly executed." Shakespeare's picture of a justice of the peace, in the opening scene of "The Merry Wives of Windsor," certainly differs from the office so unduly commended, in language so extravagantly flattering, by the Lord Chief Justice. It has been well said that Shakespeare's picture "is so truthful as to be hardly exaggerated or caricatured. The original of the picture is confined to no age."



ACCORDING to the memorandum of a contemporaneous reporter, Mr. Justice Heath refused knighthood, saying, "I am John Heath, Esquire, one of his Majesty's Justices of the Court of Common Bench, and so will die."¹



A CHAIN of authorities Milton calls "a paroxysm of citations."

¹ And Shallow, in answer to Bardolph's inquiry, "Which is Justice Shallow?" answered, "I am Robert Shallow, sir; a poor esquire of this county, and one of the King's justices of the peace."—*Second Part of King Henry IV.* Act III. Scene 2.

IN deciding upon the validity or invalidity of deeds, courts of equity act upon more enlightened principles than courts of law; and whenever it is shown to them that any person by donation derives a benefit under a deed to the prejudice of another person, — and the more especially so, if any confidential or fiduciary relation subsists between the parties, — they so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, overreaching, undue influence, or unconscionable advantage. For example, if a deed of gift, or other disposition of property, be made in favor of a husband by a wife, a court of equity will regard the matter with jealous suspicion, and will either set aside the instrument as conclusively void, or will throw upon the person benefited the burden of establishing, beyond all reasonable doubt, the perfect fairness and honesty of the entire transaction.¹ A grotesque attempt has been made in Ireland to extend this salutary doctrine to a case which assuredly its framers never contemplated. A woman, while living in adultery with a married man, had in the ardor of her affection assigned some of her property to secure a debt which was owing by her paramour. When her passion cooled, her generosity seems to have cooled also; and after the lapse of a short period she had the hardihood to apply

¹ 1 Taylor Ev. § 129.

to the Court of Chancery to set aside her assignment on the ground of undue influence. Her prayer was of course rejected, the court holding that the doctrine on which she relied for relief was only applicable when some lawful relation had been contracted between the parties.¹



IN “The Practice Unfolded” of the High Court of Chancery, p. 5, ed. 1672, is this rule of equity pleading which obtains at the present day:—

“No counsellour ought to put his hand to any bill, answer, or other pleading, unless it be drawn, or at least perused by himself in the paper draught, before it be ingrossed, and they are to take care that the same be not stuffed with repetition of deeds, writings, or records in *hæc verba*; but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief terms, without long and needless traverses of points not traversable, tautologies, multiplications of words, or other impertinencies, occasioning needless prolixity, that the *ancient* brevity, succinctness in bills, and other pleadings may be restored and observed.”

And on p. 30 is a rule of practice which *ought* to obtain at the present day:—

“The counsel that misinforms the court in his motions, or moves not informing the former order in the

¹ Hargreave v. Everard, 6 Irish Eq. Rep. N. S. 278.

cause, hath had his order so misgotten, thereby vacated, and costs awarded to be paid by himself or his client, by himself if it lay in him to have informed himself better, or else by the client who misinformed his counceel, and while this course was used little was there of references to consider of the truth of such informations. The counsellor in respect of his credit, and the client for fear of such costs, being then careful not to misinform in any thing which they were sure to hear of again by motion of the adverse party to the next motion-day."



THE Supreme Court of the United States does not consider "codes" to be the embodiment of true progress; or that "wisdom will die" with those that make them. With reference to the common law of Special Pleading, Mr. Justice Grier observed: "This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to

the court, delaying and impeding the administration of justice.”¹ And by way of illustrating the absurdities into which such a course had actually led, the court names a case in which (at the end of a chaos of so-called pleadings) the *jury gave a verdict for* \$1,200, *and the court rendered judgment for four negroes.*²



SOMETHING more than the ceremony of marriage was necessary to give the wife a right of dower, by the laws of Normandy. “C’est au coucher que la femme gagne son douaire” — “il faut qu’elle couche avec son mari pour acquérir son douaire c’est ce qui donne la dernière perfection à ce droit.”³



IN Noy, 48, a precedent is cited in these words: “The jurors acquitted a prisoner contrary to their evidence, and for that they were fined and imprisoned, and bound for the good behavior of the prisoner during his life.”



IN the index to the last London edition (A. D. 1867) of Smith’s Leading Cases, we find this title: “Eagle’s Eyes, Court will not always look with.”

¹ *McPaul v. Ramsey*, 20 Howard, p. 525. And see the caustic observations of the same acute judge in *Farni v. Tesson*, 1 Black, 315.

² Preface to the Fourth Edition of Gould on Pleading.

³ Flau-t, Coutume de Normandie, 528, cited 1 Washburn on Real Property, 197.

ON the danger of admitting presumptive evidence of death, Lord Langdale was in the habit of referring to a very singular case, which happened within his own knowledge while he was on the bench. A sum of money in court was subject to a trust for a particular individual for life, and after his death was to be divided between certain parties. These parties petitioned for payment of the fund to them, on the ground that the individual in question, the tenant for life, was dead. No positive evidence could be adduced of his death; but it was said that his death must be presumed, inasmuch as the evidence showed that he had gone abroad some twenty or thirty years ago, under circumstances of difficulty, and that no human being had heard any tidings of him from that day to this.

This did not satisfy Lord Langdale, and he desired the case to stand over, intimating that if further evidence could be produced to corroborate the already strong presumption, he would attend to it. Additional affidavits were accordingly filed, after the lapse of some time, and the case then appeared so strong that he made the order for division of the fund as prayed. The extraordinary portion of the case remains to be told, — the order, when drawn up according to his lordship's directions, was carried to the proper office to be entered; and the clerk, whose duty it was to enter it, turned out to be the very individual on whose presumed death the order for

payment was made. It seems that in early life he had been involved in scrapes and difficulties, which led him to fly his country, and to keep his residence and career a secret from all his relatives,—that he had returned in time, under a fictitious name, to England, where he at length obtained a situation in the office in question, but without making himself known to any one,—that he was ignorant of his right in the fund in question, and that, but for the remarkable accident just related, he would have been deprived of these rights, and the fund would have been prematurely given over to persons not then entitled to it.



ABOUT the year 1554, Henry VIII. manumitted two of his villeins in these words, which are not without their application at the present day: “Whereas God created all men free, but afterwards the laws and customs of nations subjected some under the yoke of servitude, we think it pious and meritorious with God to manumit Henry Knight, a taylor, and Herle, a husbandman, our natives, as being born within the manor of Stoke Clymmysland, in our county of Cornwall, together with all their goods, lands, and chattels acquired or to be acquired, so as the said persons and their issue shall from henceforth by us be free and of free condition.”¹

¹ Barrington on the Statutes, p. 395, 5th ed.

THOUGH evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these articles are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions, which, for want of some link in the evidence, are by no means warranted by the facts proved.¹ The abuse of this kind of evidence has been a fruitful theme for the satirist; and many amusing illustrations of its effect might be cited from the best authors. Shakespeare makes Jack Cade's nobility rest on this foundation; for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, "was by a beggarwoman stolen away," "became a bricklayer when he came to age," and was his father, one of the rioters confirms the story by saying, "Sir, he made a chimney in my father's house, and the *bricks* are alive at this day to testify it; therefore deny it not."² Archbishop Whately, who makes use of the above anecdote in his diverting "Historic Doubts relative to

¹ 1 Taylor Ev. § 501.

² Part Second of King Henry VI. Act IV. Scene 2.

Napoleon Bonaparte," adds: "Truly this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold." So, in the interesting story of "The Amber Witch," the poor girl charged with witchcraft, after complaining that she was the victim of the sheriff, who wished to do "wantonness with her," added, that he had come to her dungeon the night before for that purpose, and had struggled with her, "whereupon she had screamed aloud, and had scratched him across the nose, as might yet be seen, whereupon he had left her." To this the sheriff replied, "that it was his little lap-dog, called Below, which had scratched him while he played with it that very morning," and, having *produced the dog*, the court were satisfied with the truth of his explanation.¹



LORD MANSFIELD, while confessing a wish for popularity, added, in words which cannot be too often quoted, "But it is that popularity which follows, not that which is run after; it is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means."²

¹ The Amber Witch, translated by Lady Duff Gordon, pp. 78 - 80.

² The King v. Wilkes, 4 Burrow, 2562.

THE case of *Poor v. Poor*, 8 N. H. 307, was a libel filed by a wife, praying for a divorce, on the ground of extreme cruelty on the part of the husband. The opinion of the court was delivered by Chief Justice Richardson. It is too long to be quoted at length, but it will well repay a perusal. It is graced with quotations from *Hudibras* and from *Virgil*. The Chief Justice says: "Her next complaint grows out of a contest between them with respect to some wood, in August, 1833. Her story is that she sent a little girl out to procure some wood; that Poor met the girl at the door and told her 'she should not;' that she then went herself for the wood, and as she went out he went into the house. When she returned she found the door fastened, upon which she threw her wood into the house, through the window, and took a crowbar and knocked at the door—that Poor came out in a great passion, and using very profane language, which she repeats, but which we shall not, took the crowbar from her by force—that she screamed murder and he stopped her mouth. But at length she escaped, and soon after deserted the house. In the skirmish which ended in his taking the crowbar from her, she seems to have encountered some of

‘The perils that environ
The man that meddles with cold iron,’

and to have been rather roughly handled. But considering the irritable temper of the husband, it seems to us that she escaped with quite as little injury as

she could have had any right to expect, in such an attempt to take his castle by storm.

“She has another complaint of personal chastisement inflicted by the husband, in the dispute about certain papers belonging to the society for educating pious young men, of which society she was treasurer. Her account of this affair is, that Poor took the papers from her drawer and put them into his desk — that she demanded them, and he refused to restore them — that a few days afterwards she had an opportunity to obtain possession of them in his absence, and took them away. When he came home and was informed of this, he flew into a violent passion, and, using very profane and abusive language finally horsewhipped her.

“The wife was the treasurer of the society, and to take the papers from her without her consent and lock them up in his desk, certainly had the appearance, not only of unkindness, but of an unmanly meddling in a concern which was exclusively under the management of the ladies who belonged to the society, and must have been calculated to vex and irritate the wife.

“On the other hand, her taking advantage of his absence, to open the desk and take away the papers has in it too much of the

Flectere si nequeo superos Acheronta movebo,

too much of a disposition to have her own will, and her own way, by foul mean — if not by fair, to be commended in a wife, and was calculated to exasperate her husband.”

FROM the language used by Lord Raymond in his report of the case of *Brewster v. Kitchin*,¹ it would seem that he had no great respect for the justices who sat with Lord Holt. After mentioning a decisive objection to an action started by the Chief Justice, he says: "But the other three judges seemed to be in a surprise, and not in truth to comprehend this objection; and therefore they persisted in their former opinion, talking of agreements, intent of the party, binding of the land, and I know not what. They gave judgment for the plaintiff, against the opinion of Holt Chief Justice."



IN the "Statutes of the Streets," printed in 1598, it is ordered that "no man . . . shall whistle after the houre of nyne of the clock in the night," or "keep any rule whereby any such suddaine outery be made in the still of the night, as making an affray or beating his wife or servant," etc.



FORTESCUE affirms that "a jury is not, nor can be, bound by any opinion of the House of Commons, nor by any court of law in the world, but that of their own consciences."²

¹ 1 Ld. Raym. 322.

² De Laud. Leg. Ang. p. 107. Cited in Broom Constitutional Law, p. 868.

HOLT C. J. "If a man solicits a woman and goes gently to work with her at first, and when he finds that will not do he proceeds to force, it is all one continued act, beginning with the insinuation and ending with the force. And this being an attempt and solicitation to incontinency, coupled with force and violence, it does by reason of the force, which is temporal, become a temporal crime in the whole. An indictment will not lie for a plain adultery, but libel in the spiritual will."¹



FROM the journal of a Gloucestershire magistrate, A. D. 1715 to 1756, it appears that Frances Williams, a damsel who, loving well rather than wisely, is necessitated, on the 13th April 1715, to appear before the magistrate, in accordance with the law as it then stood, "to be examined about her great belly." A week subsequently she is again brought before him "touching the aforesaid *fclony*."



IN a case in the Court of King's Bench, in consequence of the affirmative of the issue being on the defendant, and his beginning, the jury found a verdict for the defendant when they intended to find for the plaintiff. The court refused to grant a new trial.²

¹ *Rigault v. Gallizard*, Holt, 51.

² *Bridgewood v. Wynn*, 1 Harrison & Wollaston, 574. *Bridgewater v. Plymouth*, 97 Mass. 382, 391.

LORD CAMPBELL, in his *Life of Lord Lyndhurst*, p. 141, gives the following account of the great case of *The Queen*, plaintiff in error, *v. Millis*.¹ “The law lords were definitively divided upon the most important question which ever came before the House of Lords as the Supreme Court of Appeal. Unfortunately such a question was decided on the technical maxim by which the House of Lords alone, of all the tribunals I ever read of, is governed, — *Semper presumitur contra negantem*, — making the result often depend upon the language in which the questioned is framed.² In Ireland, a man who was a member of the Established Church was married to a woman who was a Presbyterian by a regularly officiating Presbyterian clergyman, both parties intending to contract a valid marriage, and believing that they had done so. They lived together some years as man and wife, and had several children, who were acknowledged as legitimate. The husband then married another wife, the former wife being still alive, and was indicted for bigamy. His defence was that the first marriage was a nullity, and therefore that he committed no crime when he married the second wife. Then arose the fearful question, whether by the common law of England there might be a valid marriage by the consent of the parties without the presence of a priest episcopally ordained. For half a cen-

¹ 10 Clark & Finnelly, 534 (1844).

² But see *Durant v. Essex Company*, 7 Wallace, p. 113, and Appendix, p. 755.

tury, ever since the decision of Lord Stowell, in the famous case of *Dalrymple v. Dalrymple*,¹ it had been considered established doctrine that the presence of an episcopally ordained priest was unnecessary. This doctrine had been expressly approved of by Lord Kenyon, Lord Ellenborough, Lord Tenterden, and all our most eminent Judges, and upon the strength of it there had been repeated convictions for bigamy. But in an obscure book, lately published, professing to state ‘The Law of Husband and Wife,’² the doctrine was controverted; and upon this doctrine proceeded this prisoner’s defence. The Irish Judges were equally divided; and, strange to say, the English Judges, being consulted by the House of Lords, declared themselves unanimously of opinion that the first marriage was null, although they admitted that this was contrary to the Canon Law which prevailed in every other country of Europe before the Council of Trent. They relied chiefly on a supposed Anglo-Saxon law, that, to make nuptials prosperous, ‘there must be present a *mass priest*.’ Yet they admitted that a marriage celebrated by one in deacon’s orders always was and is valid, notwithstanding that a deacon is not a mass priest. Six law lords had been present at the argument, — the Lord Chancellor, Lord Lyndhurst, Lord Abinger, Lord Cottenham, Lord Brougham, Lord Denman, and Lord Campbell. Of these, the

¹ 2 Hazard Cons. Rep. 54 (1711).

² *Report on the Law of Husband and Wife*, ed. Jacob, 1826.

first three voted for reversing the conviction, and the last three for affirming it.

“If the motion had been that the judgment be affirmed, we, the contents, should have succeeded in establishing the old common law as laid down by Lord Stowell, the *presumption* being against the *negative*; but the Chancellor, according to a standing order of the House, put the question that ‘the judgment be reversed,’ and we were obliged to say ‘*Not content*,’ the presumption was against us, and a judgment passed by which hundreds of marriages, the validity of which had not been doubted, were nullified, and thousands of children were bastardized.”



LORD COKE says that if a gentlewoman be termed “spinster,” she may abate the writ.

An indictment against Alicia S. of D. in the county of S., wife of F. S. *spinster*, etc. is not good; for spinster being an indifferent addition for man or woman, should refer to F. S., which is the next antecedent, and so the woman has no addition.¹



IN a recent case Chief Justice Erle observed: “It is certainly an odd sort of an estate, — a fee-simple in a profit à prendre.”²

¹ Dyer, 46 b. Noy Maxims, 4.

² Bailey v. Stephens, 12 C. B. N. S. p. 103.

THE following is Lord Langdale's graphic description of Lord Cardigan's celebrated trial: "The House was rather thin of Peers. The case went off in a very absurd way. The indictment was for firing at Harvey *Garnett Phipps* Tuckett, with intent to kill, etc.; but when they came to prove this, there was no witness produced who knew Lieutenant Tuckett by any other name than 'Harvey Tuckett'; and the consequence was that Sir William Follett immediately objected that there was no evidence to sustain the indictment.

"Strangers were therefore ordered to withdraw, and Lord Denman stated that he considered the objection valid, and in this he was supported by Lords Abinger, Brougham, Wynford, etc.; and then, after a little debate whether the House should at once proceed to judgment, it was decided that they would; and the question of 'Guilty, or not Guilty?' being put, Lord Cardigan was immediately acquitted."¹



CONSENT cannot give jurisdiction where the law has not given it.¹



"JUDGES may die, and courts be at an end; but justice still lives, and, though she may sleep for a while, will eventually awake and must be satisfied."¹

¹ *Jordan v. Dennis*, 7 Met. 590. *Lawrence v. Wilcock*, 11 A. & E. 944.

² Per Paterson, J., in *Penhallow v. Doane*, 3 Dall. 86.

A CASE where great importance depended upon the precise time of death was that of the late Earl Fitzhardinge, who died "about midnight," between October 10th and 11th. His rents, amounting to £40,000 a year, were payable on Old Lady Day and Old Michaelmas Day. The latter fell this year (1857) on Sunday, October 11, and the day began at midnight; so that if he died before twelve, the rents belonged to the parties taking the estate; but if after, they belonged to and formed part of his personal estate. The difference of one minute might therefore involve the question as to the title of £20,000.



IN the case of *City of Oakland v. Carpentier*, 13 Cal. 549, 550, the court, referring to the charter of the city of Oakland, say: "A perverse ingenuity seems to have been exercised to make it as lame and loose as possible. The joint labors of Malaprop and Partington could scarcely have made such a collocation or dislocation of words and sentences. Among other things it gives the Board of Trustees power 'to license and suppress dram-shops, horse-racing, gambling houses, and houses of ill-fame, and all indecent and immoral practices, shows, and amusements.' This is certainly a curiosity in the way of legislation.



LORD CHANCELLOR HARDWICKE once judiciously observed that the virtue of a woman does not consist merely in her chastity.—2 Atk. 339.

IN North's Life of Lord Keeper Guilford,¹ it is said :
"The court, answering the title of Common Pleas, was placed next the hall door, that suitors and their train might readily pass in and out. But the air of the great door, when the wind is in the north, is very cold, and, if it might have been done, the court had been moved a little into a warmer place. It was once proposed to let it in through the wall (to be carried upon arches) into a back room, which they call the Treasury. But the Lord Chief Justice Bridgman would not agree to it, as against Magna Charta, which says that the Common Pleas shall be held in certo loco, or in a certain place, with which the distance of an inch from that place is inconsistent, and all the pleas would be coram non judice. Although, at the same time, others thought that the locus, there, means the villa only ; so that the returns being apud Westmonasterium, the court might sit on the other side of the Abbey, and no solecism of jurisdiction happen. But yet that formal reason hindered a useful reform ; which makes me think of Erasmus, who, having read somewhat of English law, said that the lawyers were doctissimum genus indoctissimorum hominum."



IN 1539 Parliament passed "An Act for abolishing Diversity of Opinions in certain Articles concerning Christian Religion."²

¹ Vol. I. p. 199. Manning Serviens ad Legem, 179, 180.

² 31 Hen. VIII. ch. 11.

SIR JOHN STRANGE, Solicitor-General, better known in the profession by his Reports, thus records under his own hand his early success and good fortune: "Memorandum. Having received a considerable addition to my fortune, and some degree of ease and retirement being judged proper for my health, I this term (M. T. 16 Geo. II.) resigned my offices of Solicitor-General, King's Counsel, and Recorder of the city of London, and left off my practice at the House of Lords, Council Table, Delegates [now the Judicial Committee of the Privy Council], and all the courts in Westminster Hall, except the King's Bench, and there also at the afternoon sittings. His Majesty (Geo. II.), when at a private audience I took leave of him, expressed himself with the greatest goodness towards me, and honored me with his patent, to take place for life next to his Attorney-General.—Anno ætatis meæ 47." ¹



THE king, for prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not offend against them; and the disobeying a proclamation, when legal, has been said to constitute a substantive offence, for which the offending party may be punished. But said Sir Edward Coke, "I never heard an indictment to conclude *contra regiam proclamationem*."²

¹ 2 Strange, 1176.

² 12 Rep. 75.

IN the reign of Elizabeth, actions for slanderous words were of frequent occurrence; and many refined distinctions were resorted to by the Judges. To call a man a cuckold was not an ecclesiastical slander; but wittol was, for it imports his knowledge of and consent to his wife's adultery.¹ Shakespeare noticed this distinction. In "The Merry Wives of Windsor," Act II. Scene 2, Ford exclaims, "Terms names!—Anaimon sounds well; Lucifer, well; Barbasen, well; yet they are devil's additions, the names of fiends: but cuckold! *wittol*-cuckold! the devil himself hath not such a name."



IN 1824 John Richardson, Esq., published an edition of Branch's Maxims with a translation. The following are specimens of this scholarly performance: *Erroris scribentis nocere non debent*, that is, Clerical errors ought not to vitiate, is translated, "*The mistakes of a man writing ought not to harm.*" Again, the well-known maxim, *Omnis nova constitutio futuris temporibus formam imponere debet, non præteritis*, which Mr. Broom accurately translates, "A legislative enactment ought to be prospective in its operation, not retrospective," is thus rendered, "*Every new institution should give a form to future times, not to past.*"

¹ Holt C. J. in *Smith v. Wood*, 2 Salk. 682.

IT has sometimes been supposed that the bench offers but little opportunities for eloquent fancy or polite erudition; how erroneous this opinion is, our readers will see from the following exordium of an opinion delivered by Chief Justice Crozier, in the case of *Searle v. Adams*:¹—

“In this case, the irrepressible Statute of Limitations is again presented for consideration. For some years past, upon the disposition of each succeeding case involving a construction of this statute, it was considered, by bench and bar, that fiction itself could scarcely conceive of a new question to arise thereunder: but, as term after term rolls around, there are presented new questions, comparing favorably in point of numbers with Falstaff’s men in buckram; thus adding to the legions that have gone before a new demonstration of the propriety and verity of the adage, that ‘truth is stranger than fiction.’ With the heat of ninety-eight degrees of Fahrenheit in the shade, and the newspapers teeming with reports of the ravages of our great common enemy, who, the more effectually to accomplish his double purpose of capturing the imprudent and frightening the timid, has assumed the form of the Asiatic monster, it might be supposed by the unthinking that the consideration of such questions would be entered upon rather reluctantly. But we beg to disabuse the public mind of any such heresy. Cases might be imagined where

¹ 3 Banks, 515, 518.

'smashes' would not stimulate, nor 'cobblers' quicken, nor 'juleps' invigorate; but a new question under our Statute of Limitations, in coolness and restoring power, so far exceeds any and all of these, that, when one is presented, the 'fine ould Irish gintleman's' resurrection under the circumstances detailed in the song becomes as palpable a reality as the 'Topeka Constitution,' or 'the territorial capital at Mineola.' The powers of a galvanic battery upon the vital energies are wholly incomparable to it. So that the consideration of this case upon this day of wilted collars and oily butter should not entitle the court to many eulogies for extraordinary energy in the fulfilment of its duties. . . . Counsel was understood to intimate that some mischievously disposed persons, with a diabolical intent not clearly revealed, while organized as the legislature of the State, had made a violent and unwarrantable onslaught upon the Constitution,—that Constitution which this court, as a tripedal pier, is exerting its utmost endeavors to support,—that Constitution which, not only from patriotic and moral, but from alimentary considerations as well, we are bound to maintain and defend. Being in a somewhat 'melting mood' to-day, we would be pleased to gratify counsel by adopting his fears," etc.

The learned justice then goes on to decide the case, and concludes that "it is as transparent as the soup of which *Oliver Twist* implored an additional supply," that the case does not come within the statute.

If the reader desires a further specimen of Judge Crozier's eloquence, we refer him to his remarks in *Craft v. The State*,¹ in defending the somewhat obvious proposition, that a jury is not bound, as matter of law, to disbelieve the evidence of a prostitute; or, to use his own words, that it ought not to be said that a woman "pours out from her heart at Venus's shrine with her virtue every other good quality with which in our thoughts we endow her sex," and this "whether she habitually flaunts her frailty in the face of the world, or attempts to hide it in reticacy, or garnish it with garlands of good works."



THE fact that a libel is published in a newspaper on the communication of a correspondent is not admissible in evidence to mitigate damages.² In an early case in Pennsylvania, the court quaintly says: "It will not be denied that if one designedly bespatters another's clothes with filth as he passes the street, though at the instigation of a third person, he would be liable for damages. And shall a printer with his types blacken the fairest reputation — the choicest jewel we enjoy — and go scot-free, merely because he has told the world that the paper is inserted at the request of another?"³

¹ 3 Banks, 450, 480.

² *Talbutt v. Clark*, 2 M. & Rob. 312, per Lord Denman, C. J.

³ *Runkle v. Meyer*, 3 Yeates, 518, quoted in *The North American Review*, August, 1880, p. 113.

“IF we judge against former judgments, said Prisot, C. J., it is a bad example to the barristers and students of Law; they will not have *any faith* in, or give any credit to their books.” — Year Book, 33 Hen. VI. 41.



IN “The Practice of the High Court of Chancery Unfolded,” ed. 1672, we find the following among “Suits denied help in the Chancery, pp. 49, 50”: —

Perpetuities of all kinds by assurances, statutes acknowledged, etc. for they fight against God.

A plaintiff making his title by an entail, the Lord Chancellour Egerton dismissed it, saying of the statute *De donis conditionalibus*, calling it the ambitious statute, let it help him at the law as it may.

Casual morts upon the return from Constantinople, etc.

Play-houses and all houses of iniquity, the court being a court of equity.

Estates derived under concealed titles, the Lord Egerton saying that as the titles began by the rigour of the law, let them so maintain them by the law as they come.

Country awards by the voluntary submission of the parties without any order or reference of court.

A man steals his wife against her friends’ assent, and sues for a portion here: Lord Egerton, He that steals flesh let him provide bread how he can.

MR. BISHOP, in his learned and instructive "Commentaries on the Law of Married Women," Vol. II. § 727, thus discourses on the statutes of Massachusetts:—"This is one of those States in which legislation, almost ever since the popular agitation of the subject of married-women laws commenced, has been travelling forward, seeking rest and finding none. . . .

"At present, the laws on this subject are contained in the General Statutes of 1860, and not far from a dozen supplementary acts. The most important of the latter is the act of April 24, 1874; it leaves but little, as respects property and personal rights, to be complained of by the most ardent advocate of the policy which yields to wives the double advantages of matrimony and single bliss, and lifts from the shoulders of their husbands none of the burdens borne when the law gave them compensatory advantages. It remains only to add a provision compelling every young man to marry instantly the girl who chooses him, and the end of domestic woe will have come in Massachusetts.

"Then she can have, as she can have now if the man will submit to the marriage, for her sole and separate use, to accumulate till her husband dies, all that she owned before marriage, all that comes to her afterward, and all that she can acquire by her labor and skill; while he provides for her house-room, meals, clothing, and the other necessities of life. Whether,

he shall occupy her bedroom at night, or take a separate room and conduct himself as he ought if not married, it is for her to determine. If she chooses, she may employ her time with domestic cares; or, if she chooses, she may leave her babes for him to look after and nurse, and her meals for him to prepare with his own, while she engages in business on her separate account, and accumulates money not a cent of which or its increase is she required to appropriate to the support of her family or even of herself, — all must be borne by the husband. The author is happy to know, from some acquaintance with the women of Massachusetts, that, on the average, they are not the softs which the men are who made these laws. Whether the future children will inherit the qualities of the father or the mother, the developments of coming years will disclose."



MR. JUSTICE EMERY once observed: "The case cited from Yerger's Reports we have not been so happy as to see. We regret it the more because of the high reputation of the court and of the reporter. We must be contented to take the law as we find it this side of the Alleghanies." ¹

¹ *State v. Field*, 14 Maine, 219.

DR. BENTLEY'S CASE. A process issued to the beadle to compel Bentley to appear at the next court. The beadle accordingly waited upon Bentley and showed him the process, and served him with it. Upon discourse between them concerning the process and the Vice-Chancellor, Bentley contemptuously said, the process was illegal and unstatutable, and that he would not obey it; he took the process out of the hands of the beadle, saying the Vice-Chancellor was not his judge, and that he acted foolishly.

LORD CHIEF JUSTICE PRATT: "As to Dr. Bentley's behavior upon being served with the process, I must say it was very indecent, and I can tell him if he had said as much of our process we would have laid him by the heels for it; he is not to arraign the justice of the proceedings out of court before an officer, who has no power to examine it. When he said the Vice-Chancellor acted foolishly, it was what he might have been bound over for to his good behavior."¹



ACCORDING to Lord Campbell, in the tenth year of King Henry VII., that very distinguished judge, Lord Hussey, who was Chief Justice of England during four reigns, in a considered judgment delivered the opinion of the whole Court of King's Bench as to the construction to be put upon the words, "As free as tongue can speak or heart can think."²

¹ Strange, 557, 2 Ld. Raym. 1334; 8 Mod. 148; Fortescue, 202.

² Year Book, 10 Hen. VII. fol. 13, pl. 6.

IN Saunders's report of the case of *Veale v. Warner*,¹ after a statement of his argument for the defendant, he proceeds: "And of such opinion was the whole court clearly. But they would not give judgment for the defendant, because they conceived it was a trick in pleading; but they gave the plaintiff leave to discontinue on payment of costs. And Kelynge Chief Justice reprehended Saunders for pleading so subtly on purpose to trick the plaintiff by the omission of the other part of the award. But it was a case of the greatest hardship on the defendant; for the bond of submission was only in the penalty of £2000, and the arbitrators had awarded him to pay £3100, being £1100 more than the real penalty of the bond; when, in truth, there was nothing at all due to the plaintiff, but he was indebted to the defendant."



IT is one of the principles of eternal justice, that no one is to be punished or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard. Fortescue, J. refers to a very old precedent in support of this doctrine.² "I have heard it observed by a very learned man," says he, "that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam,' says God, 'where art thou?'

¹ 1 Saund. 327, 327 a, 6th ed.

² 1 Strange, 567.

Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat ?' And the same question was put to Eve also." In a recent case this passage was cited in his judgment by Mr. Justice Maule.¹



IN *Birks v. Trippet*,² is the following passage : "And Twisden Justice interrupted Saunders, and said to him, 'What makes you labor so ? The court is of your opinion, and the matter clear.'"

The reporter appended the following note to the case of *Hayman v. Gerrard*:³ "The court said that the replication in this case was well concluded, and as it ought to be : quod mirum videtur ; for it seems to me that the replication was bad upon that account, but well enough for the other point." The reporter's wonder is now confirmed.⁴



PRACTICE is law solidified into fact.⁵



AN indictment of death ought to comprehend the day of the stroke and day of the death ; and the same law of poisoning ; so that it may be known if he died of the same stroke or not.⁶

¹ *Abley v. Dale*, 10 C. B. 71, 72 (1850).

² 1 Saund. 33 b, 6th ed.

³ 1 Saund. 103, 6th ed.

⁴ *Thorne v. Jenkins*, 12 M. & W. 614. ⁵ The Reporters, 255, 3d ed.

⁶ *Brooke's New Cases*, March's Translation, p. 114, ed. 1873.

THERE is a well-known judgment of Mr. Justice Maule, when a difference of opinion existed among the members of the bench. "I agree," said this caustic judge, "with the conclusions of my brother A., for the reasons offered by my brothers B. and C."



"SURPLUSAGE," said the same eminent judge, in that happy mode in which he combined wit and wisdom, "is something that is altogether foreign and inapplicable, as if you were to state that a man had a *blue coat on and* did a certain thing; but it is not surplusage to say that the defendant knocked the plaintiff down, and *also* tore his clothes, and *also* put his eye out."



THE book called Latch's Reports is confessedly but a copy made by Latch from some other book. "Reader!" appeals the editor of Latch, in pompous and lying solemnity, "the testimonials of many sages of the law, the judges, and his contemporaries, give you an assurance, above all I can express, that the original of this impression was all written by that worthy person's own hand." In the preface to Palmer's Reports it is said somewhat snarlingly, that the cases in Latch are reported "corruptly enough."¹

¹ W. L. Palmer's Reports, 1890, 31 ed.

IN the “Assizes de Jerusalem” — one of the most curious and important relics of the jurisprudence of the Middle Ages, a compilation made towards the close of the eleventh century — we have a full account of the office, duties, and proper qualifications of a pleader. As a translation of this barbarous dialect may save the reader some trouble, the following very literal one is offered :¹ “Every person about to plead in the Supreme Court ought, before he begins, to pray the lord to appoint him counsel. He ought to pray, for his counsel, the best pleader in the court; and this, whether he is himself a pleader or not; because, in the latter case, he will need counsel to defend his right, and establish his claim or defence; and even in the former, he will do well to have counsel; since there is no pleader so wise, that he may not be often advised, on his pleading, by another pleader; as two pleaders know more than one, etc. He who has counsel, and wishes to make claim on some man or woman present in court, ought to say by his counsel to the lord, so that the other party may hear, Sir, such an one makes, before you, such a claim, and hopes to obtain justice, in that behalf, from you and the court; and then he should say what he claims, and in the shortest way possible, etc. A good pleader ought to have good sense, a sound understanding, and a subtle genius; he should be free from the faults of indecision, timidity, false shame,

¹ Stephen on Pleading, Appendix, p. xiv. 9th Am. ed.

haste, and nonchalance; while he pleads, he should keep his attention from wandering to any other subject, and should also take care to avoid undue heat and asperity." Some of these admonitions seem to deserve the attention of the nineteenth no less than the eleventh century.



THE old reporters often note the manner of the judges. Godbolt tells us that the "Lord Chancellor, smiling, said"¹ that a case might be doubted. Rolle questions the correctness of an opinion uttered by Coke, since "Haught semble a disallower ceo car il shake son capit at ceo."² And Saunders reports a case where a majority of the court gave judgment for the plaintiff, but "Twisden Justice contratotis viribus, and that the action did not lie."³ In recording the judgments of this somewhat passionate judge, the reporters begin, "Twisden, in furore, observed," etc.⁴



"THEY [corporations] cannot commit trespass nor be outlawed nor excommunicate, for they have no souls." — 10 Rep. 32 b.⁵

¹ Lord Mountjoy's Case, Godbolt, 18.

² *Hudson v. Barton*, 1 Rolle Rep. 189.

³ *Pomfret v. Rieroff*, 1 Saund. 322.

⁴ See Saunders, *passim*.

⁵ Recent cases have decided that an action will lie at the suit of or against a corporation for a libel. *Whitfield v. Southeastern Railway Company*, 27 L. J. Q. B. 229. *Metropolitan Saloon Omnibus Company, v. Hawkins*, 28 L. J. Exch. 291.

OF a recent Act of Parliament, it was remarked by Mr. Justice Maule, "that it was incongruous and impossible of operation, and its absurdities so great that the framers themselves had no very distinct notion of its meaning."¹

In a very recent case,² Blackburn J. observed with respect to an Act passed in 1746: "The statute, though not drawn in modern times, is somewhat obscure."



PLOWDEN states this case. If a woman is warden of the Fleet, and one imprisoned in the Fleet marries her, it is an escape in the woman and the law adjudges the prisoner to be at large, for he cannot be lawfully imprisoned but under a keeper, and he cannot be under the custody of his wife, for which reason the law must necessarily adjudge him to be at large.³



YELVERTON thus concludes his report of a case in which he was of counsel with the defendant: "And therefore the plaintiff, seeing the opinion of the court against him, prayed that he might discontinue the suit. Quod fuit concessum per Fleming Chief Justice, and the other justices would not cross him in it."⁴

¹ *Stratton v. Pettit*, 16 C. B. p. 432.

² *Regina v. Scott*, 4 Best & Smith, p. 314.

³ Comm. 37.

⁴ *Doughty v. Fawn*, Yelv. p. 227.

THE learned Lord Chief Justice of the Court of Queen's Bench thus discourses of the subtilitas legum: "An amusing instance of this subtilitas is given by Gaius,¹ in the case of a man who brought an action against another, on a law of the Twelve Tables, for cutting down his vines. The plaintiff proved the fact, but he was defeated, or, as we should say, nonsuited, because the law in giving the action had spoken only of cutting down *tres*, and it was held that the plaintiff ought to have followed the words of the law. I take it there is nothing to beat this to be found in Meeson and Welsby. No wonder that Gaius,² speaking of the old legal actions, is led to say, '*Sed istæ omnes legis actiones paulatim in odium venerunt. Namque ex nimia subtilitate veterum eo res perducta est, ut qui minimum erroris litem perderet.*' Of this, indeed, the volumes of Meeson and Welsby might furnish us with instances in abundance."



IN an old case³ Hale C. J. said that "if such an action should be allowed," — that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court, — "the judgment would be blowed off by a side wind."⁴

¹ Inst. IV. 12.

² Inst. IV. 30.

³ *Vanderberg v. Blake*, Hardres, 191.

⁴ Quoted by Byles J. in *Base v. Matthews*, Law Rep. 2 C. P. p. 687.

LORD BACON relates¹ that in Chancery, one time, when the counsel of the parties set forth the boundaries of the land in question by the plot, and the counsel of one part said, "We lie on this side, my lord," and the counsel of the other part said, "We lie on this side," the Lord Chancellor Hatton stood up and said, "If you lie on both sides, whom will you have me to believe."



ROLLE reports a case² which contains a discussion between the bar and the bench, which deserves a place beside Stradling v. Stiles, reported by Pope. The report cannot with good taste be copied; but it is worth reading, in the original, by any one fond of that literature elegantly veiled in French catalogues as "*curieux*."



IN the first volume of Cushing's Reports³ is this marginal note: "The jurisdiction of State courts being limited by State lines, it is difficult to see how the order of a court, served upon a party out of the State in which it is made, can have any greater effect than knowledge brought home to the party in any other way."

¹ Apothegms, pl. 74. Works, Vol. VII. p. 136, ed. Spedding.

² White v. Brough, 1 Rolle Rep. 286. Wallace The Reporters, 183, 3d ed.

³ Ewer v. Coffin, 1 Cush. 24.

SOME very significant remarks of Lord Holt are found in the case of *Wright v. Sharp*.¹ It was a motion to have exceptions allowed after the trial. Lord Holt said: "You should have insisted on your exception at the trial; you waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause upon this point."



"HOWSOEVER the verdict seem to stray," says Lord Hobart, "and conclude not formally or punctually unto the issue, so as you cannot find the words of the issue in the verdict, yet if a verdict may be concluded out of it to the point in issue, the court shall work it into form, and make it serve."²



IN 1674 Lord Chief Justice North, in his judgment in a celebrated case,³ says: "These instances shew that an action upon the case is esteemed a *catholicon*," that is, according to Johnson's Dictionary, "an universal medicine."

¹ 1 Salk. 288. Quoted by Shaw C. J. in *Holbrook v. Jackson*, 7 Cush. p. 151.

² *Foster v. Jackson*, Hobart, 51. Quoted in *Commonwealth v. Stebbins*, 8 Gray, p. 496.

³ *Barnardiston v. Soame*, 6 Howell State Trials, p. 1108.

SIR THOMAS CLARKE, Master of the Rolls, observed: "There are two things against which a judge ought to guard, — precipitancy and procrastination. Sir Nicholas Bacon was made to say, which I hope never again to hear, that a speedy injustice is as good as justice which is slow."¹



"NOTHING can call this court into activity," judicially observed Lord Camden, "but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing."²



IF one man keeps a school in such a place, another may do so likewise in the same place, though he draw away the scholars from the other school, 't is true, this is *damnum*, but 't is *absque injuria*; but he must not shoot guns at the scholars of the other school, to fright them from coming there any more.³



LORD HALE says a jury should be told "where the main question or knot of the business lies."⁴

¹ *Atherton v. Worth*, 1 Dickens, p. 377.

² *Smith v. Clay*, 3 Brown C. C. p. 639 note.

³ Holt Chief Justice, 3 Salk. 10.

⁴ History of the Common Law, 256. Quoted in the judgment in *Blackburn v. Crawford*, 3 Wallace, p. 194.

WHILE Chief Justice Richardson was attending the assizes at Salisbury, a prisoner, whom he had condemned to death for some felony, threw a brickbat at his head; but, stooping at the time, it only knocked off his hat. When his friends congratulated him on his escape, he said, "You see, now, if I had been an upright judge, I had been slain." The additional punishment upon this offender is thus curiously recorded by Chief Justice Treby in the margin of Dyer's Reports, p. 188 b. "*Richardson C. J. de C. B. at Assizes at Salisbury in Summer 1631, fuit assault per Prisoner condempne par Felony;—que puis son condamnation ject un Brickbat a le dit Justice, que narrowly mist. Et par ceo immediately fuit Indictment drawn par Noy envers le Prisoner, et son dexter manus ampute et fixe al Gibbet, sur que luy mesme immediatement hange in presence de Court.*"



ONE Brown set forth in libel his descent; that another person, in way of defamation, said he was no gentleman, but descended from Brown, the great pudding-eater, in Kent; but it appearing he was not so descended, but from an ancient family, he that spoke the words underwent the sentence of the court, and decreed to give satisfaction to the party complaining.¹

¹ Rushworth, Vol. II. pt. 2, p. 1055.

IN *Baker v. Pierce*,¹ Holt C. J. said : “ I remember a story told by Mr. Justice Twisden, of a man that had brought an action for scandalous words spoken of him, and upon a motion in arrest of judgment, the judgment was arrested ; and the plaintiff being in court at that time said, that if he had thought he should not have recovered in his action, he would have cut his throat.”



IN Massachusetts, in a recent case² it was said that “ before parties were made competent witnesses, it was the practice to prove their intent by a variety of circumstances, because no man can know the secret purposes of another’s heart except himself.”



LEVINZ observes “ that the judges of late years have had a greater consideration for the *passing* of the estate, which is the *substance* of the deed, than the *manner* how, which is the shadow.”³



THE forms of decrees are the best exponents of the law.⁴

¹ 2 Ld. Raym. 960.

² *Fisk v. Chester*, 8 Gray, p. 508.

³ 3 Levinz, 372. Cited 2 Saund. 97 b, 97 c, 6th ed.

⁴ Per Lord Justice Knight Bruce, in *Sherwin v. Shakespeare*, 23 L. J. Ch. 901.

IN the celebrated case, *Stockdale v. Hansard*,¹ the Sheriffs of London were imprisoned by the House of Commons for a contempt in doing that for the *not* doing of which the like fate would have awaited them at the bar of the Court of Queen's Bench.



MEDLYCOTT *v.* JORTIN² was a case upon Mr. Serjeant Hill's will, which was so singularly confused, that but for the respect due to the very learned Serjeant, it might, not unreasonably, have been held void for uncertainty. The will of Sir Samuel Romilly was also inartificially penned, and that of Chief Baron Thomson was the subject of Chancery proceedings. So also were the wills of Chief Justice Holt,³ Chief Justice Eyre,⁴ Mr. Serjeant Maynard,⁵ Vernon, the eminent chancery counsel,⁶ Baron Wood,⁷ Mr. Justice Vaughan,⁸ Francis Vesey Junior, the reporter,⁹ and Richard Preston, the conveyancer.¹⁰ Chief Justice Saunders appears to have made a speculative devise, upon the validity of which

¹ 9 Ad. & El. 1.

² 2 Broderip & Bingham, 632.

³ Viner Ab. Apportionment, p. 18.

⁴ G. Cooper, 156.

⁵ Earl of Stamford *v.* Sir John Hobart, 3 Brown P. C. 31.

⁶ Acherley *v.* Vernon, 1 P. Wms. 783.

⁷ Baker *v.* Bayldon, 31 Beavan, 269. "He was one of the greatest of pleaders." Per Hayes J. in *The Queen v. Diplock*, 10 Best & Smith, p. 175.

⁸ Knight *v.* St. John, coram Wood V. C. (1862).

⁹ Vesey *v.* Vesey, coram Kindersley V. C. (1862).

¹⁰ Whyte *v.* Preston, coram the Master of the Rolls (1862).

his executors, Maynard, Holt, and Pollexfen, all great lawyers, were divided in opinion.¹ The will of Bradley, the celebrated conveyancer, was set aside by Lord Thurlow for uncertainty.² And a late learned Master in Chancery directed the proceeds of his estate to be invested in Consols *in his own name*.³



THE following passage is taken from the preface to Lilly's Reports (A. D. 1719) p. xxix: "I admit that good forms are very necessary, where they relate to the subject-matter, but are ridiculous where they do not; as for instance, the form of a declaration in assault and battery is *quare vi et armis* (the defendant) *in et super* (the plaintiff) *insultum fecit et baculis gladiis et cultellis verberavit et vulneravit*, etc. The very same term was once used by a skilful attorney in an action against the defendant for assaulting the plaintiff's wife, who voluntarily departed from her husband, and lived with the defendant in adultery. I remember great advice was taken about this declaration, and that it was resolved by all the counsel for the plaintiff, that the criminal familiarity of the defendant was very properly expressed by those words, *in et super* (the plain-

¹ Reports of Cases in the Law of Real Property and Conveyancing, App. 24.

² Martin's Conveyancer's Recital Book, 35 note (1834).

³ Hayes & Jarman Forms of Wills, 98 note, 7th ed. See also 7 Notes of Cases, 377; 2 Robertson Eccl. Rep. 140; *Bigge v. Bigge*, 9 Jurist, 192.

tiff's wife) insultum fecit; but it was strenuously objected against the words *vi et armis*, because there was an apparent proof of the consent and compliance of the woman, and that *baculi gladii et cultelli* were improper instruments to carry on an amorous correspondence. After a long debate, a very grave lawyer (whose opinion was to conclude the rest) consented to lay down the cudgels, but would not leave out *vi et armis*; and his reason was, because they must keep up to the ancient and approved forms."



IN a recent text-book is this typographical error: "It is quite true that the opening of a new *widow* looking into the grounds of another may not only annoy that neighbor, but may often affect the value of his property. But the law of England considers that no injury."¹



A PROHIBITION was granted on a libel for saying "He has no sense, is a dunce and a block-head; I wonder the bishop would lay his hands on such a fellow; he deserves to have his gown pulled over his ears"; because a parson is not punishable in the Spiritual Court for being a dunce or a blockhead, more than another man.²

¹ Tyler, *Treatise on the Law of Boundaries*, etc., 519, citing *Jones v. Tapling*, 12 C. B. N. S. 842, per Blackburn, J.

² *Coxeter v. Parsons*, 11 Mod. 141 note.

BY an appeal of death private prosecutors could insist on a second trial for life after an acquittal, and could exercise or withhold according to their caprice, or temper, or cupidity, the divine attribute and royal prerogative of mercy. But such is the force of judicial habit that we find the very distinguished Chief Justice Holt, in the reign of Queen Anne, declaring from the bench, "I wonder that any Englishman should brand an appeal with the name of an odious prosecution; I look at it as a true badge of English liberty." But after the celebrated case of *Ashford v. Thornton*,¹ the legislature looked upon this method of prosecution in an entirely different light, and it was abolished by 59 Geo. III. ch. 46.



SIR MATTHEW HALE writes: "A great lawyer hath been much blamed for burning a peer on the hand, that confessed an indictment of manslaughter; and it was the only error of note that the person erred in to my observation."²



BEFORE the statute 30 Geo. III. women from the remotest times were sentenced to be burned alive for every species of treason; this Blackstone attributes to the regard of our ancestors for "the decency due to the sex."³

¹ 1 B. & Ald. 405 (1815)

³ 4 Bl. Comm. 93.

² 2 Hale P. C. 377.

IT is often said satirically, though no satire was originally intended, that corporations have no souls. It would seem that no argument is necessary to prove this legal axiom. Chief Baron Manwood, however, established it by a syllogism, in which it is not easy to detect any fallacy. "The opinion of Manwood C. B. was this, as touching corporations; that they were invisible, immortal, and that they had no soul, and therefore no subpoena lieth against them, because they have no conscience nor soul; a corporation is a body aggregate; none can create souls but God; but the king creates them, and therefore they have no souls. And this was the opinion of Manwood Chief Baron touching corporations."¹



SIR SAMPSON DARRELL'S CASE.²

SIR SAMPSON DARRELL was fined £5 for erecting a windmill in his own ground, within the forest, and Mr. Attorney Noy said it ought not to be done, because it frightened the deer, and also drew company to the disquiet of the game.



LIBEL for calling a man a knave: prohibition lies, *because* in the time of Henry VI. knave was a good addition.³

¹ 2 Bulstrode, 233.

² W. Jones, 293. Transcribed by Mr. Wallace The Reporters, 187, 2d ed.

³ Latch, 156. 1 Siderfin, 119.

THE proposition for conducting all law proceedings in English was most strenuously opposed. The reporters, who delighted in the Norman French, were particularly obstreperous. "I have made these Reports speak English," says Style in his preface (A. D. 1658), "not that I believe they will be thereby more generally useful, for I have been always and yet am of opinion, that that part of the common law which is in English hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others than to defend themselves; but I have done it in obedience to authority, and to stop the mouths of such of this English age, who, though they be confessedly different in their minds and judgments, as the builders of Babel were in their language, yet do think it vain, if not impious, to speak or understand more than their own mother tongue." And Bulstrode, in the preface to the Second Part of his Reports, says "that he had many years since perfected the work in French, in which language he had desired it might have seen the light, being most proper for it, and most convenient for the professors of the law."



TWISDEN JUSTICE said he remembered that a shoemaker brought an action against a man for saying he was a cobbler; and though a cobbler be a trade of itself, yet it was held that the action lay in Chief Justice Glyn's time.¹

¹ 1 Mod. 19.

KERIFFORD, an attorney, was plaintiff in battery, and the case was thus: He was walking in the market (as attorneys do too much), and the defendant and he had some angry words there, upon which the defendant did press to go by him, and in going, by reason of the throng of people there, he jostled the plaintiff, and for this he brought this action, in which if an assault only be proved, it is insufficient, and holden it was no assault, for the touching him or jostle was to another end, namely, to get by him in the throng, and not to beat him, etc.¹



“MEMORANDUM.—One Mr. Guye Faux of the parish of Leathley, a cavilleer, had a cause heard about a plunder, upon Monday this week after dinner, and was well in court, and damage against him a hundred pounds, and he was found dead next morning upon the conceit of it, as was supposed.”²



THE judge did put back the jury twice, because they offered their verdict contrary to their evidence, as he held and set a hundred-pound fine upon one of the jury who had departed from his companions; but after, upon examination, it was taken off again, for that it did appear it was only by reason of the crowd, and some of his fellows were always with him.³

¹ Clayton, 22.

² *Ibid.* 116.

³ *Ibid.* 31.

A CASE was recently determined by the Court of Exchequer Chamber which in the opinion of Mr. Justice Blackburn involved "a nice and puzzling question." The question was whether the law as to the liability of gratuitous bailees of personal property applied to a *building*. The plaintiff loaned his shed to the defendant to make a signboard, and D., a carpenter employed by the defendant, while at work lighted his pipe from a match with a shaving, which he dropped, and thereby set fire to the shavings on the ground, by which the shed was burned. A majority of the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, held that the defendant was not liable, on the ground that the loan of the shed was a mere license to use the shed, revocable at any time.¹



IN very early times "every one was to have a remedial writ from the King's Chancery, according to his plaint," of which the following is the most ancient form:—

Rex etc. [to the Judge.] Questus est nobis A. quod B. etc. Et ideo tibi (vices nostras in hac parte committentes) precipimus quod causam illam audias et legitimo fine decidas.²

¹ *Williams v. Jones*, 3 H. & C. 256, 602 (1865). Story on Bailments, § 223 a, 8th ed.

² *Mirroure of Justices*, 8.

IN *Manby v. Scott*,¹ Mr. Justice Wyndham specifies the following among the “many inconveniences which must ensue” if the husband shall be bound by the contract of the wife:—

1. The husband will be accounted the common enemy; and the mercer and the gallant will unite with the wife, and they will combine their strength against the husband.

3. Wives will be their own carvers, and, like hawks, will fly abroad and find their own prey.

4. It shall be left to the pleasure of a London jury to dress my wife in such apparel as they think proper.

5. Wives who think that they have insufficient will have it tried by a mercer whether their dress is not too mean, and this will make the mercer judge whether he will dispose of his own goods or not.



IN the case of *Hookes v. Swaine*,² Twisden Justice said he remembered a nice case. Sir William Fish was bound by obligation to pay, on a certain day, in Gray’s Inn Hall, £50 generally, without saying of money; and therefore upon the day when the gentlemen were at supper, Sir William came in, and tendered fifty-pound weight of stone; and adjudged no tender.

¹ 1 Siderfin, 169 (1662, 1663). ² Smith L. C. 418, 6th London ed.

² 1 Siderfin, 151.

SO completely does a pardon of treason or felony extinguish the crime, that when granted to a man, even after conviction or attainder, it will enable him to have an action of slander against another for calling him traitor or felon; "because the pardon makes him as it were a new man, and gives him a new capacity and credit."¹ "In the eye of the law the offender is as innocent as if he had never committed the offence."²



IN the Year-Books, 30 & 31 Edw. I. pp. 503–507, is this case: A man was arraigned for felony, but on producing a charter of pardon was discharged. Another man was arraigned for harboring him, and, notwithstanding the acquittal of the principal, he was made to pay a fine. The report concludes thus: "Note, the Justices did this rather for the King's profit than in accordance with law; for they gave this decision 'in terrorem.'"



A WOMAN libelled in the Arches against another for calling of her jade, and a prohibition was prayed and granted, because the words were not defamatory. And Reeve said that for whore or bawd no prohibition would lie, but they doubted of quean.³

¹ 2 Hawkins P. C. Ch. 37, § 48. Vol. II. p. 518, ed. Curwood.

² *Ex parte Garland*, 4 Wallace, p. 359. *United States v. Padelford*, 9 Wallace, p. 542.

³ March, pl. 235.

AN action of false imprisonment brought against a constable, who pleaded not guilty, the defendant did show in evidence, that he came to search in time of the plague for lodgers in the town, and he found a stranger and questioned him which way he came into the town; who answered, Over the bridge, and the judge conceived this to be a scornful answer to an officer, and because he had no pass, but travelled without one, and gave such an answer, the defendant did offer to apprehend him, and the plaintiff thereupon being present said to the defendant, He shall not go to prison, but yet offered to pass his word for his forthcoming, upon which the defendant did commit the plaintiff, and it was ruled upon evidence there was good cause to commit the plaintiff for opposing the constable, though but verbally, in his office, who is so ancient an officer of the Commonwealth.¹



IF B. have a right of entry into his house, he ought to have a common entrance at the usual door, and shall not be made to enter at a hole, a back door, or a chimney; and if they leave the common door open and make a ditch, so that B. cannot enter *without skipping*, the condition is broken. So if I am obliged to suffer J. S. to have a way over my land, and when I see him coming, I take him by the sleeve and say to him, "Come not there; for if you do, I will pull you by the ears," the condition is broken.²

¹ Sheffield's Case, Clayton, 19.

² Latch, 47.

THERE are some things personal, and so inseparably connected to a man's person, that he cannot do them by another; as the doing of homage fealty. So it is holden that a lord may beat his villein, for cause or without cause, and the villein is without remedy; but if the lord command another to beat him without cause, who does accordingly, the villein shall have an action of battery against him. So if the lord distrain his tenant's cattle, when nothing is behind, yet the tenant, for the reverence and duty that appertains to the lord, shall not have trespass *vi et armis* against him; but if the lord command his bailiff or servant to distrain, *secus*.¹



IN the report of one of the Scotch Appeal Cases in the House of Lords, we find this marginal note:—

“Per The Lord Chancellor: Mrs. Reid is to be pitied for the course into which she has been dragged, evidently without any consciousness on her part of the extreme folly of these proceedings.”²

And in the very next case in the same volume are these, and only these, marginal notes:—

“Per Lord Chelmsford: It is really lamentable to think of the enormous expense incurred in this case.”

“Per Lord Westbury: Such things occur in the appeals from Scotland day by day.”³

¹ Comb's Case, 9 Rep. 76 a.

² Keith v. Reid, Law Rep. 2 H. L. Scotch, 39 (1870).

³ Fraser v. Crawford, Law Rep. 2 H. L. Scotch, 42.

“PRAYING general relief,” said Lord Hardwicke,¹ “is sufficient though the plaintiff should not be more explicit in the [particular] prayer of the bill; and Mr. Robins, a very eminent counsel, used to say, ‘*General* relief was the best prayer next to the Lord’s Prayer.’”



IN his Abridgment,² Rolle says, “Jeo aie oie mon seigneur Coke a citer two verses pur ceo de Sir Thomas Moore:—

‘Three things are to be helpt in conscience :
Fraud, accident, and things of confidence.’”



ONE suggestion by Mr. John Reeves, the author of the “History of English Law,” in his elaborate essay on the effect of the Treaty of Peace of 1783, is amusing enough to be quoted: “I have heard it asked, if the king was to send his writ to command the attendance of Mr. Jefferson in this kingdom?—I agree he would not come; but that would be no test of the law upon the subject; it is an inconvenience in point of fact.” The case thus put recalls that of Glendower and Hotspur:—

Glendower. I can call spirits from the vasty deep.

Hotspur. Why, so can I, or so can any man;

But will they come when you do call for them?³

¹ Cook v. Martyn, 2 Atkyns, 3.

² 1 Rolle Abr. 374.

³ First Part of King Henry IV. Act III. Scene 1. For this passage I am indebted to a writer in The American Law Review, Vol. IV. p. 362.

IN *The Emperor of Austria v. Day*,¹ Lord Campbell Lord Chancellor observed: "Notwithstanding my sincere respect for the authority of that great American jurist, Justice Story, I cannot concur with him in his recommendation of a mysterious obscurity to be preserved by courts of equity respecting special injunctions, and the caution which should make them 'decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions should be granted or withheld.'² The recommendation of mystery and obscurity in treating of judicial jurisdiction is only fit for the Star Chamber, which was called 'a Court of Criminal Equity.'"



"THE case seems to fall very much within the quaint expressions of Lord Hobart in *The Earl of Clanrickard's Case*,³ where that very learned judge says: 'I do exceedingly commend the judges that are curious and almost subtle, astuti (which is the word used in the Proverbs of Solomon in a good sense when it is to a good end), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act.'"⁴

¹ 3 De Gex, Fisher & Jones, 211, 238.

² Story Equity Jurisprudence, Vol. II. § 959 b.

³ Hobart, 277.

⁴ Judgment of Byles J. in *Hayne v. Cummings*, 16 C. B. N. S. p. 428.

THE manner in which Sir John Strange occasionally comments on the opinion of the court, in his Reports, is quite amusing. To a remark of the Court he appends the following note: "It was *only* Mr. J. Wright who said this; and see *The King v. The Inhabitants etc. of Bishopside*, Trin. T. 1755. B. R. adjudged, 'contra': and in reference to another part of the same opinion, he says: 'It was *only* Mr. J. Chapple, who said this: and he was wrong; for the Act expressly requires' etc."



IN *Manby v. Scott*,¹ among the reasons for the second "point there established," it is said: "In the Spiritual Court, such bad women as have violated their vows shall have such provision as clerks convict,² and shall be fed with the bread of affliction and the water of adversity."



"THE law did not condescend to take notice of base animals. A dog was not the subject of larceny at common law, because, as it was said, a man shall not hang for a dog. 7 Rep. 18 a."³

¹ 1 Sidertin, 109. ² Smith L. C. 422, 6th London ed.

³ Staunforde, 149.

³ Willes J. in *Regina v. Martin*, Law Rep. 1 C. C. p. 59. See *Regina v. Robinson*, Bell C. C. 24.

IN the reign of Henry VIII. a statute was passed, whereby it was enacted that every woman about to be married to the King, or any of his successors, not being a true maid, should disclose her disgrace to him under the penalty of treason; and that all other persons knowing the fact, and not disclosing it, should be subject to the lesser penalty of misprision of treason.¹ This law, which was afterwards repealed, as “trespassing too strongly as well on natural justice as female modesty,”² continued in force during the remainder of this reign, and, according to Lord Campbell,³ “so much frightened all the spinsters at Henry’s court, that, instead of trying to attract his notice, like Anne Boleyn, Jane Seymour, and Catherine Howard, in the hope of wearing a crown, they shunned his approach as if he had been himself the executioner, and they left the field open for widows, who could not by any subtlety of Crown lawyers be brought within its operation.”



THERE is a curious case in Coke’s “Second Institute,” p. 562, ed. 1797. Indictment against a parson for conspiracy, who pleads that he was “*communis advocatus*,” and so justified as attorney to the other. It was found that he was “*communis advocatus*,” and not guilty.

¹ Statutes of the Realm, Vol. IV. p. 859.

² 1 Bl. Comm. 222.

³ Lives of the Lord Chancellors, Vol. II. p. 108, 5th ed.

IN the quaint language of Hide J. in *Manby v. Scott*, in the Exchequer Chamber,¹ if “the wife will have a velvet gown and a satin petticoat, and the husband thinks mohair or farendon for a gown, and watered tabby for a petticoat, is as fashionable, and fitter for his quality, who is to decide the controversy? Not the wife, nor a jury it may be consisting of drapers and milliners, but the husband.”²



IN the trial of Algernon Sidney, in one respect counsel deserved rebuke, and even Jeffries was not unjust in administering it. Lord Chief Justice: “Look you, gentlemen of the jury. There are some gentlemen at the bar, as we are informed, are apt to whisper to the jury. It is no part of their duty; nay, it is against their duty.”³



NOY reports a case in the Star Chamber as follows: “The defendants upon a riot, in destroying sixteen foot of a hedge for a commoner. There they were fined every one 40 s. And the plaintiff for suing in that court for that riot was fined £20. And so both parties were fined, which was seldom seen before.”⁴

¹ 1 Mod. 121, 128.

² Quoted in the Judgment of Blackburn J. in *Bazeley v. Forder*, 9 Best & Smith, p. 694; Law Rep. 3 Q. B. p. 564.

³ 9 Howell State Trials, 837.

⁴ *Bellew v. Bullocke*, Noy, 191.

IN Tremaine's "*Placita Coronæ*," pp. 34, 35, is a precedent of an indictment against Sir John Johnston, a Scotch knight, for stealing and marrying one Mary Wharton, an heiress, "to the great displeasure of Almighty God, to the great disparagement of the said Mary, and to the utter sorrow and affliction of her friends." Tremaine writes in a note: "Sir John Johnston was a stranger to the English laws, and when he was called to judgment was much surprised, and asked if it was a hanging matter; but nevertheless sentence was given against him, and he was executed on a gibbet before the lady's door in Great Queen Street."



IN an appeal of death, the defendant waged battel, and was slain in the field; yet judgment was given that he should be hanged, which the judges said was altogether necessary, for otherwise the lord could not have a writ of escheat.¹



IN the Year-Book, 22 Henry VI., we find counsel responding to one of the judges, who was putting a case to him from the bench about making a view in assize: "En le nom de Dieu, Sir, comment poit le vieu estre fait en ce cas?"²

¹ Co. Litt. 390 note.

² 22 Hen. VI. p. 11, about the middle of the page, quoted in *The Reporters*, 73, 3d ed.

COOPER brought an action upon the case against Witham and his wife, for that the wife, maliciously intending to marry him, did often affirm that she was sole and unmarried, and importuned et strenue requisivit the plaintiff to marry her; to which affirmation he gave credit, and married her, when in facto she was wife to the defendant; so that the plaintiff was much troubled in mind, and put to great charges, and much damnified in his reputation. He had a verdict, but no judgment; for by Twisden Justice the action lies not, because the thing here done is felony: no more than if a servant be killed, the master cannot have an action *per quod servitium amisit, quod curia concessit*.¹



IN an early case in Massachusetts,² Mr. Justice Parker expressed his opinion in the following forcible language: "It would seem a disgraceful occupation of the courts of any country to sit in judgment between two gamblers, in order to decide which was the best calculator of chances, or which had the most cunning of the two. There could be but one step of degradation below this, which is, that the judges should be the stakeholders of the parties."

¹ 1 Siderfin, 375.

² *Amory v. Gilman*, 2 Mass. p. 6.

IN a case in Gouldsbrough, p. 96, one of the counsel said that he had searched all the books, and "there is not one case" etc.; to which Chief Justice Anderson responded: "What of that? Shall not we give judgment because it is not adjudged in the books before? We will give judgment according to reason; and if there be no reason in the books I will not regard them."¹



"ONE of the cases in Littleton," says Mr. Wallace,² "would present but a bad idea of the manners at Oxford in 1625. We find at least the Principal of St. Mary's Hall libelling one of the Masters of Art, and a Commoner of the same Hall, '*pur ceo que il appelleuy Red Nose, Mamsey Nose, Copper-nose Knave, Rascal, and Base Fellow et autres words non dissonant.*'"³

"Another case⁴ speaks as ill of the behavior of communicants in those days of Archbishop Laud. The Reverend Mr. Burnet sues one Symons in the High Commission Court, '*pur ces que appelleuy fool en leglise et dit a lui Sirrah! Sirrah!*' and because, moreover, he, Burnet, being vicar there, Symons, at

¹ "Though a case is of first impression, if it shows a concurrence of loss and damage arising from the act complained of, the action will be maintainable." Lord Campbell Lord Chancellor in *Lynch v. Knight*, 9 House of Lords Cases, 577.

² The Reporters, 193, 3d ed.

³ *Ralph Bradwell's Case*, Littleton, 9.

⁴ *Burnet v. Symons*, Littleton, 154.

Whitsuntide, after the Communion was ended, took the cup and drank all the wine that was left; and that, when Mr. Burnet took the cup from him, ‘Symons violently reprise ces hors de ses mains arriere in facie Ecclesiae devant que les parishioners fueront tous dehors leglise.’ It is curious, and perhaps worth noting,” continues Mr. Wallace, “that the court decided that all the wine that was left after the Communion belonged to the parson. The same declaration will be found, I believe, in the rubric to the Book of Common Prayer, printed in the time of Charles II. It shows the doctrine of that day, though at present a special and more reverent provision is made for the case.”



IN Rolle’s Reports, Vol. I. p. 286, in an action for words, the case is, “Home dit, Sir Th. Holt hath taken a cleaver and stricken his cook upon the head, so that one side of the head fell upon one shoulder, and the other upon the other shoulder, et ne averr que le cook fuit mort; et par ceo fuit adjudge nemy bon”; the cook’s death, after the splitting of his head, being matter of inference only. Mr. Wallace says this case may be commended to Mr. Chitty, who may, perhaps, reconcile the matter of pleading involved in it with the doctrines of Medical Jurisprudence.

THE gravity of the poor laws was enlivened, and the sterility of settlement cases agreeably refreshed, by a catch introduced by Sir James Burrow into the report of *The King v. Norton*.¹ The reporter says: "I do not find the case of Shadwell and St. John's Wapping [which had been cited in the argument] in any printed book or manuscript. But I guess it to be the same case which I have heard reported in the form of a catch, to the following effect (if my memory serves me right):—

"A Woman having a Settlement,
 Married a Man with none :
 The Question was, he being dead,
 'If that she had, was *gone*.'
 Quoth Sir *John Pratt*² — 'Her Settlement
 SUSPENDED did remain
 Living the husband : But, him dead,
 It doth *revive* again.'"

Chorus of Pious Judges.

Living the Husband : But, him dead,
 It doth revive again.



IT is a rule of law, that *Idem non potest esse agens et patiens*; and therefore a man cannot present himself to a benefice, nor sue himself.³ No man can summon himself; and therefore if a sheriff suffer a common recovery, it is error, because he cannot sum-

¹ Burrow S. C. 124.

³ Littleton, 147 b.

² Then Lord Chief Justice.

mon himself.¹ A man cannot be both judge and party in a suit; and therefore if a judge of the Common Pleas be made judge of the King's Bench, though it be but *hac vice*, it determines his patent for the Common Pleas; for if he should be judge of both benches together, he should control his own judgment; for if the Common Pleas err, it shall be reformed in the King's Bench.² Littleton, Chief Justice of the Common Pleas, was made Lord Keeper, yet continued Chief Justice. And Sir Orlando Bridgeman was both Lord Keeper and Lord Chief Justice of the Common Pleas at the same time, for these places are not inconsistent.³



A few years ago, a learned member of Parliament brought in a bill with the double object of providing public prosecutors for England, and making it a statute offence for a servant to steal his master's corn for the purpose of feeding the master's horse.



A guest comes into a common inn, and the host appoints him his chamber, and in the night the host breaks into his guest's chamber to rob him: this is burglary.⁴

¹ Dyer, 188 a. Owen, 51.

³ 1 Siderfin, 338, 365.

² Cro. Car. 690.

⁴ Dalton, cap. 151, in nota.

THE plaintiff having, as sheriff, attached among other property, two hundred pounds of candy and five thousand Spanish cigars, entrusted the same to the defendants, taking from them a receipt in which they promised to deliver the same to him on demand.

APPLETON, J.: The defendants were unable at any time after judgment to perform their contract. The five thousand Spanish cigars were sold; each had accomplished its destiny,

tennes-que recessit

Consumpta in ventos. — *Æneid*, V. 526.

The candy was not forthcoming. Substitution would not answer the contract. Performance of their contract by the defendants, by their own acts, was out of their power. Their liability was fixed upon the demand made and the neglect to deliver.¹



MR JUSTICE EMERY, speaking of the common law of husband and wife, says: "The whole theory of the common law is a slavish one, compared even with the civil law. The merging of her name in that of her husband is emblematic of the fate of all her legal rights. The torch of Hymen serves but to light the pile on which those rights are offered up."²

¹ *Gilmore v. McNeil*, 46 Maine, 532.

² *State v. Burlingham*, 15 Maine, 106. See *Marshall v. Oakes*, 51 Maine, 310.

APPLETON, C. J. "The defendant borrowed of the plaintiff nine dollars on the Lord's Day. The moral obligation to repay money loaned is the same, whether the loan be made on one day or on another. It is an unfortunate condition of the law when the violator of its commands is rewarded by it for such violation. The defendant and the plaintiff are alike guilty of a violation of law; the former in soliciting a loan, the latter in yielding to such solicitation. Both are liable to the penalty provided by the statute. But the defendant, while guilty with the plaintiff, and equally amenable to the penalties provided by the statute, is rewarded for his wrongdoing by the refusal of the law to aid in the enforcement of a debt justly due. He is absolved from an indebtedness created at his own instance; while his associate in guilt, who yielded to his wishes, is liable to a double penalty, that inflicted by law, and that arising from the non-payment of money loaned, in addition to the sorrows of a regretful conscience.

"Juvenal indignantly says:

multi
Committunt eadem diverso crimina fato;
Ille crucem sceleris pretium tulit, hic diadema.

Sat. XIII. 103-105.

So, now, of two criminals guilty of the same offence, one is punished and the other rewarded by the law which creates the offence."¹

¹ Meader v. White, 66 Maine, 92.

THE judges determined that Lord Audley's wife might give evidence against him, for having aided one of his servants in committing a rape upon herself. They held that where a wife is the party grieved, and on whom the crime is committed, she is to be admitted a witness: and a curious reason assigned is, that in such a case a villain may be a witness against his lord.¹



IN a recent case² Mr. Justice Byles observed: "I was much struck with the quotation from Webster's Dictionary where one of the definitions given of 'tenant' is, one who has the occupation or temporary possession of lands or tenements whose title is in another." The quotation is from Cowley: —

O fields, O woods, O, when shall I be made
The happy *tenant* of your shade?



AS a general rule a piece of paper or parchment, whether blank or inscribed with any characters, is the subject of larceny. But there are at common law two exceptions: first, a muniment of title to land, which, it is held, savors of the realty; secondly, a written paper, which is mere evidence of a right,

¹ 3 Howell State Trials, 402, 413. Hutton, 115, 116.

² Birks v. Allison, 9 Jurist N. S. 694, 695. 13 C. B. N. S. 12, 23.

resting in contract only, like a bill, note, bond, or executory agreement. A reason given in both these cases is this, that the documents are of no use to any but the owner, and therefore are not in danger of being stolen. On which it has been well remarked, that "if I steal a skin of parchment worth 1 s. it is felony, but when it has £10,000 added to its value by what is written upon it, then it is no offence to take it away."¹ These exceptions are palpably capricious and unreasonable, and are not to be extended. Therefore it has been held that a pawnbroker's ticket may be the subject of larceny.²



IN Lambard's "Eirenarcha" p. 68, A. D. 1581, it is written: "Of this kind of punishment [not capital] our old law, making pretious estimation of the lives of men, had more sortes than we now have, as pulling out the tongue for false rumours, cutting off the nose for adultery, taking away the privy parts for counterfeiting of money, etc."



IT was pleaded on behalf of a Hundred charged with a loss incurred by robbery on Gad's Hill, that, time out of mind, it had been customary to rob upon Gad's Hill.

¹ *Rex v. Westbeer*, 2 Strange, 1133.

² *Regina v. Morrison*, Bell C. C. 158.

A the attorney of B. brought an action against C. for saying to B., “Your attorney is a bribing knave, and hath taken twenty pounds of you to cozen me.” Judge Warburton was of opinion that the words were not actionable, for an attorney cannot take a bribe of his own client; but Lord Hobart said he might when the reward exceeds measure, and the end of the cause of reward is against justice; as if he will take a reward to raze a record etc. And Hobart reports that after he had spoken, Justice Warburton said that he began to stagger in his opinion, and the plaintiff had judgment.¹



WORDS spoken of an attorney, “Thou canst not read a declaration,” per quod etc. The court: The words are actionable, though there had been no special damage; for they speak him to be ignorant in his profession, and we shall not intend that he had a distemper in his eyes etc. — Judgment was given for the plaintiff.²



LET the following case be a warning to all bad cooks. Trin. 8 Hen. IV. Rot. 47. Willielmus Milburn recuperat per juratam per billam suam, in qua queritur versus Johannem Cutting Cook de eo quod ipse Johannes apud Westmonasterium ven-

¹ Hobart, 8, 9. 1 Rolle Ab. 53.

² Jones v. Powel, 1 Mod. 272.

debat dicto Willielmo unum caponem pistum corruptibilem et recalefactum, qui capo assatus per quatuor dies in Hospicio Domini Regis et iterum calefactus et pistus extitit, de quo postquam edit vomitum horribilem fecit, ita quod infirmabatur per duas septimanas, recuperat inquam viginti solidos per damnis. And Rolle says he was informed that it appears upon the record at large that the justices increased the damages.¹



A woman shook a sword in a cutler's shop against the plaintiff, being on the other side of the street; and in trespass for assault and battery, there was a verdict of the assault, and not guilty of the battery. It was prayed to give no more costs than damages, and so granted; which was a noble.²



An infant brought an action of trespass by her guardian; the defendant pleads that the plaintiff was above sixteen years old, and agreed for sixpence in hand paid, that the defendant have license to take two ounces of her hair; to which the plaintiff demurred, and adjudged for her, for an infant cannot license, though she may agree with the barber to be trimmed.³

¹ 1 Rolle Ab. 89.

² *Smith v. Newsam*, 3 Keble, 283.

³ *Scroggum v. Stewardson*, 3 Keble, 369.

A very curious document has been issued from the Parliamentary printing-office. It is the bill which has passed the Commons, entitled "An Act to repeal certain statutes, which are sleeping and not in use," and it is made singular by the fact that in it are recapitulated numerous samples of ancestral wisdom. One of the statutes provides "that no man shall ride in harness within the realm nor with launcegays." Another says, "the rates of laborers' wages shall be assessed and proclaimed by the justices of the peace, and they shall assess the gains of victuallers, who shall make horse-bread, and the weight and price thereof." A third defines "what sort of Irishmen only may come to dwell in England" (this has been sleeping a very long time); and a fourth is framed to prevent a butcher from slaying any manner of beasts within the walls of London.



IN the Statutes at Large some funny things may be found. There is one which is not to be brought to book, and must be given as a tradition of the time when George III. was king. Its tenor is, that a bill which proposed, as a punishment of an offence, to levy a certain pecuniary penalty, one half thereof to go to his Majesty and the other half to the informer, was altered in committee, in so far that, when it appeared in the form of an act, *the punishment* was changed to whipping and imprisonment, the *destination* being left unaltered.

It is wonderful that such mistakes are not of frequent occurrence when one remembers the hot, hasty work often done by committees, and the complete entanglements of sentences on which they have to work. Bentham was at the trouble of counting the words in one sentence of an Act of Parliament, and found that, beginning with "Whereas" and ending with the word "repealed," it was precisely the length of an ordinary three-volume novel.



SIR MATTHEW HALE did not extend his supremacy over the entire See of the Criminal Law; and therefore, when Lord Campbell writes of his History of the Pleas of the Crown, that it is a "*complete* digest of the Criminal Law as it existed in Sir M. Hale's day," he must be understood as expressing, in an equitable sense, that what was intended to be done was done.¹



A translator of Latin law-maxims translated "*mensis sequitur sementem*," with a fine simplicity, into "the harvest follows the seed-time"; and "*actor sequitur forum rei*," he made "the agent must be in court when the case is going on." Copies of the book containing these gems are exceedingly rare, some malicious person having put the author up to their absurdity.

¹ Ruins of Time, by Amos, p. 3.

IN the Court of Queen's Bench, the name of Mr. Charles Dickens having been called, Lord Campbell said: "The name of the illustrious Charles Dickens has been called on the jury, but he has not answered. If his great Chancery suit had been still going on, I certainly would have excused him; but, as that is over, he might have done us the honor of attending here, that he might have seen how we went on at common law."



IF one that is seised in fee of an orchard makes a feoffment of it to J. S., and goes into the orchard and cuts a turf or a twig, and delivers it in the name of seisin to the feoffee over a wall of the same orchard, the feoffee then being on other land not mentioned in the feoffment, this is a void livery.¹ As to when a man shall give and take by his own livery, see Perkins, § 205.



A searcher after something or other, running his eye down the index of a law-book through letter B, arrived at the reference "Best — Mr. Justice — his great mind." Desiring to be better acquainted with the particulars of this assertion, he turned to the page referred to, and there found, to his entire satisfaction, "Mr. Justice Best said, he had a great mind to commit the witness for prevarication."

¹ 2 Rolle Ab. 6, pl. 5.

“**T**HOUGH the court may order an election *nunc pro tunc*,” said Mr. Justice Maule, “it is beyond the power of the courts, or of an Act of Parliament to recall a day that has passed, or make a thing which has happened not to have happened.”

Non tamen irritum

Quodcumque retro est efficit.¹

That, according to the writer, is beyond the power of Omnipotence itself.²

✱

AN innkeeper recently appeared at the Borough Police Court, on a summons which charged him with having his house open before one o'clock on 19th August, that being “the Lord’s day.” It was objected by the counsel who appeared for the defendant, that the term “Lord’s day” was a misnomer according to the Act of Parliament, which specified “Sunday”; and the objection being sustained by the magistrates, the case was dismissed.

✱

LORD HOLT, after stating that if a man is wrongfully brought into a jurisdiction and there lawfully arrested, he ought to be discharged, lays down the broad position, that “no lawful thing, founded upon a wrongful act, can be supported.”³

¹ Hor. III. Carm. 29. 45.

² *Mayor etc. v. Oswald*, 3 El. & Bl. 670.

³ *Luttrell v. Benin*, 11 Mod. 59. Quoted in *Ilsey v. Nichols*, 12 Pick. p. 275.

MR. JUSTICE WILLES, to illustrate the absurdity into which judges would inevitably fall, unless they applied the rules of common sense to restrict the extent of liability for the breach of a contract of the class then under consideration, observed: "Cases of this kind have always been found to be very difficult to deal with, beginning with a case said to have been decided about two centuries and a half ago, where a man going to be married to an heiress, his horse having cast a shoe on the journey, employed a blacksmith to replace it, who did the work so unskilfully that the horse was lamed, and, the rider not arriving in time, the lady married another: and the blacksmith was held liable for the loss of the marriage."¹



IN the report of a case in the State Trials, is this passage: "First came the execution, then the investigation, and last of all, or rather not at all, the accusation."



"IN all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering."²

¹ British Columbia Saw Mill Co. v. Nettleship. Law. Rep. 3 C. P. p. 503.

² Sir T. Raym. 467.

IN "Hortensius," p. 259 note, a most amusing instance of identification of counsel with client is related. It occurred in the case of a counsel for a female prisoner who was convicted on a capital charge, and on her being asked what she had to say why sentence of death should not be passed upon her, he rose and said, "If you please, my lord, *in omni vita mea.*" He was, however, wrong in point of law, — for pregnancy cannot be taken advantage of in arrest of judgment, but only in stay of execution.



IN a very recent case in Vermont,¹ we find the gravity of the discussion relative to the rights of two mill-owners enlivened by a quotation from Don Juan. Mr. Justice Barrett, in delivering the judgment of the court, quotes this line, —

"Saying 'I will never consent,' consented."²



IN the tenth London edition of Byles on Bills, p. 62, we find a case cited from "1 Massey's American Reports." The case is reported in 4 Mass. 45.



"ONE half of the English language," said Baron Alderson, "is interpreted by the context."³

¹ Kimball v. Kimball, 42 Vermont, p. 776.

² "And while I say 'I will never consent,' — I consent." *Case I. S.* 117.

³ 2 Dowl. P. C. 245.

THE first case in which the name of Chief Justice Shaw appears in the Reports is the well-known case of *Young v. Adams*.¹ The amount involved was five dollars. The case was this: A note was payable in foreign bills. The promisor paid it, and the note was given up; but one of the notes given in payment was a counterfeit bill. The payee brought his action for the amount of the counterfeit note. Mr. Shaw, for the defendant in error, put his defence on two grounds: first, that an action for money had and received would not lie; and secondly,—the ground on which he principally relied,—that where there was no fraud and no express undertaking, and both the parties were equally innocent, *no* action would lie. The case was decided for the defendant in error, the plaintiff in the court below.



WHAT old Rastell says in the following passage is strictly true: “This book entituled a collection of entrees, contayneth the forme and maner of good pleading, which is a great part of the cunning of the law of England, as the Right worshipfull and great learned man Syr Thomas Littleton, knight, sometime one of the Justices of the Common place, in his third book of Tenures, in the chapter of confirmation, saith to his some.”²

¹ 6 Mass. 182, A. D. 1816.

² Rastell's Entries, written in 1564.

IN “The Merry Wives of Windsor,” Act II. Scene 2, where Ford, disguised, tries to induce Falstaff to assist him in his intrigue with Mrs. Ford, and states that for all the money and trouble he had bestowed upon her he had received no satisfaction, nor promise of any at her hands, there is this passage:—

Falstaff. Of what quality was your love, then?

Ford. Like a fair house, built upon another man's ground; so that I have lost my edifice by mistaking the place where I erected it.

In 1852, by a decision of the Supreme Judicial Court of Massachusetts, the town of Sudbury in the county of Middlesex lost a school-house “by mistaking the place where they erected it.”¹ The principle is technical, and one of great antiquity.



AN assault was laid twenty-one different ways in an indictment. And on motion to strike them out, the court thought the clerks in the Crown office ought only to draw the indictments, and then the court could punish them for the vexation.²



IT has been said by first-class authority, that in the opinion in the case of *Brattle Square Church v. Grant*,³ “the law assumes the beauty and precision of the exact sciences.”

¹ First Parish in Sudbury v. Jones, 8 Cush. 184.

² Rex v. Pewtress, 2 Strange, 1026.

³ 3 Gray, 142.

LITTLETON thus describes the villein service :
 Tenure in villenage is most properly when a villein holdeth of his lord, to whom he is a villein, certain lands or tenements according to the custom of the manor, or otherwise, at the will of the lord, and to do his lord villein service ; as to carry and re-carry the dung of his lord out of the city, or out of his lord's manor, unto the land of his lord, and to spread the same upon the land, and such like.¹



LORD BACON'S enunciation of the maxim, *In jure non remota causa, sed proxima spectatur*, as an example of a clear and concise statement of a legal proposition has never been surpassed : “ It were infinite for the law to judge the causes of causes, and their impulsions one of another ; therefore it contenteth itself with the immediate cause ; and judgeth of acts by that, without looking to any further degree.”



THE obsequious Parliament of Richard III. passed, at the special instance of that famous sovereign, a number of private Acts, one of which was “ to prove the King to be true and undoubted heir to the Crown, and to make his brother's children bastards ” ; and the bulk of these enactments was quite in accordance with this sample.

¹ Tenures, Lib. II. § 172.

MR. JUSTICE CARR thus concludes his judgment in *Watkins v. Crouch*:¹ "It will be observed that I have cited no cases in support of this opinion; not that I have not read, and considered, and puzzled myself with the multitude that were commented on in the argument; but because, finding them like the Swiss troops, fighting on both sides, I have laid them aside and gone upon what seems to be the true spirit of the law."



THE rule of pleading by which a plea in abatement is required to give the plaintiff a better writ is lucidly stated in Britton: "If the tenant says that he does not hold the whole, then he ought to declare who holds the residue. For we will that before writs be abated for a fault or error, the tenants inform the plaintiffs how they shall purchase good writs."²



"IN examining of a witness, counsel cannot question the whole life of the witness, as that he is a whoremaster etc. But if he hath done such a notorious fact which is a just exception against him, then they may except against him. That was Onbie's case of Gray's Inn; and by all the judges it was agreed as before."³

¹ 5 Leigh, p. 539.

² Britton, Liv. III. ch. XXI. Vol. II. p. 145, ed. Oxford, 1865.

³ March, pl. 136.

LORD COKE'S commentary on Twyne's Case sinks into utter insignificance in comparison with the following passage addressed to the Supreme Court of the United States, in solemn argument : " Fraud vitiates everything into which it enters. It is like the deadly and noxious simoom of arid and desert climes. It prostrates all before its contaminating touch, and leaves death only and destruction in its train. No act however solemn, no agreement however sacred, can resist its all-destroying power." ¹



THE government cannot be carried on without officers ; therefore a refusal, without lawful excuse, to accept of a public office to which a person has been duly elected, is indictable. " Happily there is in this country," observes Mr. Bishop, " widely diffused, a commendable willingness to do this duty ; therefore indictments for the breach of it are rare." ²



" ANTIQUITY of time fortifies all titles, and supposeth the best beginning the law can give them." ³

¹ Commercial Bank of Manchester v. Buckner, 20 Howard, p. 109.

² 1 Comm. on Crim. Law, § 912

³ Lord Hobart, in Slade v. Drake, Hobart, 295. Quoted in the considered judgment in Ellis v. Mayor etc. of Bridgnorth, 15 C. B. N. S. p. 77.

IN striking contrast with the inflated eulogies prefixed to the posthumous editions of some of the old reporters is the preface to Durnford and East, par excellence the "Term Reports": "In a work of this kind all that can be expected is accuracy; to polish and digest properly requires long time and much labour." For care and accuracy of finish, and a matchless propriety of style, which they everywhere maintain, these reporters have never been surpassed.



"ALMOST all who sign as surety," says Chief Justice Appleton, "have occasion to remember the proverb of Solomon: 'He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure.' But they are nevertheless held liable upon their contracts, otherwise there would be no smarting, and the proverb would fail." ¹



"I take the law to be," said Mr. Justice Blackburn, "that you must not injure the property of your neighbour, and consequently, if filth is created on any man's land, then in the quaint language of the report in *Salkeld*,² 'he whose dirt it is must keep it that it may not trespass.'"³

¹ *Mayo v. Hutchinson*, 57 Maine, p. 547.

² *Tenant v. Goldwin*, Salk. p. 361.

³ *Hodgkinson v. Ennor*, 4 Best & Smith, p. 241.

BELLEWE, in the preface to his Reports, quaintly says to the reader: "Beseeching you that where you shall find any faults, which either by my insufficiency, the intricateness of the work, or the Printer's recklessness, are committed, either friendly to pardon, or by some means to admonish me thereof."



IN the time of that great Admiralty judge, Lord Stowell, such was the paucity of legal business, that he objected at first to Reports of the proceedings, "fearing lest the Report should expose the nakedness of the land."¹



ONE TOPLIN, an attorney, was indicted for a common barrator, but acquitted by the jury. Yet he threatening the witnesses, and it appearing to the court, that he was a notable knave, he was bound to his good behaviour.²



AN old English statute commenced by an enactment relating to the admission of attorneys, and finished by prohibiting the importation of horned cattle.

¹ Coote New Practice of the Court of Admiralty, Preface, p. v, 1st ed.

² Toplin's Case, Latch. 5; Blackerby, 110.

THE following case, says an able writer, as relating to the official conduct of one of the greatest judges that ever sat on the King's Bench, cannot fail to give rise, in the mind of the discerning reader, to many interesting reflections.

In the month of November 1768, a woman having appeared before two of his Majesty's justices of the peace to swear a child against the secretary to Count Bruhl, the Saxon minister, the Count interfered, and the justices were afraid to proceed. The woman applied to Sir Fletcher Norton, who advised that a motion should be made, in the Court of King's Bench, for a peremptory mandamus to the justices to proceed in that filiation. The motion was accordingly made by Mr. Mansfield.

The Lord Chief Justice Mansfield received it with marks of anger and surprise; he said he did not understand what was meant by such collusive motions, unless it was to draw from that court an opinion upon the privileges of foreign ministers, which they had no right to meddle with; that the motion was absolutely improper; that he wondered who advised it, and that he certainly should not grant the mandamus.

Sir Fletcher Norton then got up, and said that the party was his client; that his Majesty's subjects, when injured, had a right to redress somewhere or other; and that he knew of no place where such redress could be legally applied for or obtained, but in the Court of King's Bench; that therefore he had advised the motion.

Lord Mansfield, upon this, began to flourish, in his usual style, upon the sacred privileges of ambassadors, the law of nations etc. etc., repeated something about collusive motions, and took notice that the application for redress ought regularly to have been made to Count Bruhl, or to his Majesty's attorney-general.

Mr. Justice Aston said, deliberately, that he agreed entirely with the Lord Chief Justice, and that the motion ought not to be granted.

Sir Fletcher Norton then said that after he had declared *himself* the adviser of the motion, he did not expect to have heard it again called *collusive*; that he despised and abhorred all ideas of *collusion* as much as any man in that court; that it was the first time, and he hoped it would be the last, that he should hear the Court of King's Bench refer an injured subject of England to a *foreign minister* or to an *attorney-general* for redress; that the laws of this country had not left his Majesty's subjects, complaining of injury, without a legal and certain protection; that their claim was a claim of *right*, upon which the Court of King's Bench had full authority to inquire, and *must* determine; that if his clients were injured, he should always bring them to that court for redress, let who would have committed the injury, and he would take care that that court *should* do them justice; that his motion was proper and *should not* be withdrawn.

Judge Yates then said that the reasons offered by Sir Fletcher Norton had clearly convinced him; that he had not the least doubt of the authority of the court to protect his Majesty's subjects; and that, for his part, he should never refer them either to a foreign minister or to an officer of the Crown; that he thought the motion perfectly regular, and that it ought to be granted.

Judge Aston then began to recant. He said that he was always glad to be convinced of a mistake, and happy in having an early opportunity of acknowledging it; that, from what his brother Yates and Sir Fletcher Norton had said, he saw clearly that his first opinion had been erroneous, and that he agreed the motion ought to be granted.

Lord Mansfield then, in great confusion, said that he should take time to consider of it. To this Sir Fletcher Norton replied, that, as two of the three judges were of the same opinion, the motion *must* be granted; but that, for his part, if his lordship wanted any time to consider whether, when a subject applied to the Court of King's Bench for redress, he was or was not to be referred to a foreign minister or to an attorney-general, he had no objection to allowing him all the time he wanted.



“THE sparks of all sciences in the world,” said Sir Henry Finch, “are taken up in the ashes of the law.”

IN considering presumptions which tend to establish the offence of adultery, regard is had to the peculiar modes of life of the parties, and the habits of the community wherein they dwell. Thus where the parties are near of kin, or sustain the relation of physician and patient, a carnal intercourse will be less readily inferred; and, according to the old canonists, if a clergyman is found embracing a woman in some secret place this does not, as in the case of other people, prove adultery, for “he is not presumed to do it on the account of adultery, but rather on the score of giving his benediction, or exhorting her to penance,”¹ — “a good illustration of the principle,” observes Mr. Bishop, “though few judges in modern times would yield so much to clerical virtue as this application of the principle implies.”²



IN the Year-Book, 22 Edw. IV. 20, is a case to this effect: “The Abbot of St. Albans sent his servant to a feme covert to come to his master and speak with him. The servant performed his command, and thereupon the woman came with him to the Abbot: and when the Abbot and the woman were together, the servant (who knew his master’s will) withdrew from them, and left them two in the chamber alone; and then the Abbot said to the woman that her apparel was gross apparel; to whom the woman said that her

¹ Ayliffe Parergon, 51.

² Bi-shop on Marriage and Divorce, Vol. II. § 631.

apparel was according to her ability, and according to the ability of her husband: the Abbot (knowing in what women repose delight) said to her, that if she would be ruled by him, she should have as good apparel as any woman in the parish, and solicited her chastity: when the woman would not consent to him, the Abbot assaulted her, and would have made her an ill woman against her will, which she would not suffer; whereupon the Abbot kept her in his chamber against her will, and to the intent etc. The husband, having notice of this abuse to his wife, spoke of all this matter, and said that he would have his action of false imprisonment against the Abbot, for that he had imprisoned his wife: whereupon the Abbot (adding one sin to another) sued the innocent and poor husband for defamation in the Spiritual Court, because the husband had published that the Lord Abbot had solicited his wife's chastity, and would have made her an ill woman: but upon all this matter disclosed to the court, the husband had a prohibition, because the husband might have an action at the common law for this assault and imprisonment of his wife, although he then had no action, nor perhaps never would; yet because the scandal determinable in the Ecclesiastical Court was upon the matter disclosed, mixed with matter determinable at the common law, for this cause, upon a motion made by the Abbot's counsel to have a 'consultation' in that case, it was denied by the court."

LORD CHANCELLOR THURLOW held, upon the construction of the Statute of Frauds, which requires that a will of lands shall be subscribed by the witnesses in the *presence* of the testator, that a will was well executed where a lady who made it, having signed it in an attorney's office, got into her carriage, and the carriage was accidentally backed by the coachman opposite to the window of the office, so that, if she had been inclined, she might have let down the glass of the carriage and seen the witnesses subscribe the will.¹



IN Forsyth's "Constitutional Law," p. 246 note, a case is related of a lady of rank who, being pressed by her creditors, married a convict in prison under sentence of transportation; and, having become a married woman, she was released from her debts and from liability to arrest. She took care, however, not to follow her husband to a penal settlement.



A WOMAN of full age contracted matrimony with a lad of twelve years, and solemnized it in the face of the church, and in some way consummated it, the man being put into the bed with her; and he died before the age of consent. In a cause of dower this is true matrimony.²

¹ *Casson v. Dade*, 1 Brown C. C. 99. Dickens, 586.

² Dyer, 369 a. pl. 48, 49.

THE indictment against John Bunyan ran thus: "John Bunyan hath devilishly and perniciously abstained from coming to church to hear Divine service, and is a common upholder of several unlawful meetings and conventicles, to the disturbance and distraction of the good subjects of this kingdom, contrary to the laws of our sovereign lord the King." He was convicted and imprisoned twelve years and six months.



IN the course of the argument in *Lincoln v. Wright*,¹ Lord Langdale observed: "All interrogatories must, to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness if he knew anything about something."

¹ 4 Beavan, p. 171. With regard to leading questions it would be useful for the objector to remember the remark of Lord Ellenborough: "I wish that objections to questions as leading might be a little better considered before they are made. It is necessary to a certain extent to lead the mind of the witness to the subject of the inquiry. If questions are asked to which the answer yes or no would be conclusive, they would certainly be objectionable; but, in general, no objections are more frivolous." *Nicholls v. Dowling*, 1 Starkie N. P. C. 81.

In this connection the following anecdote is worthy of transcription: Serjeant Davy was often employed at the bar of the House of Commons. On one occasion he called a witness to prove some point, and put a question of no great importance which was immediately objected to by the opposite counsel. The counsel on both sides, according to the usual form, were ordered to withdraw, and the House began to debate on the propriety of the question. The discussion lasted for *some hours*; but at length the determination being in favor of Davy, he was called in, and the Speaker informed him he might put the question. "I protest, Mr. Speaker," replied Davy, "*I entirely forget what it was.*" This, as may easily be believed, threw the House into a roar of laughter.

FORMERLY if a bill was brought into Parliament at the close of the session, and passed on the last day, which made an act previously innocent criminal, and even capital, and if no day was fixed for the commencement of its operation, it was considered to have been passed on the first day of the session; and the consequence was, that all who had in the mean time been doing what at the time was perfectly legal were liable to suffer the punishment created by statute.¹



“A BILL of exception,” says Clayton, “is to prevent the precipitancy of the judge, and ought to be allowed in all courts and in all parts of the pleading, and may be put in any time before the jury have given their verdict. *Quod nota.*”² The further proceeding provided by statute in Massachusetts “to prevent the precipitancy of the judge” by settling the truth of exceptions when he disallows or alters the same, was probably unknown in Clayton’s time.



CLAYTON reports that a challenge to a jury was directed by the court to commence in this form: “May it please you, Mr. Justice Barkley” etc. And he calls attention to “the modesty of the judge at this time, not to direct to say, ‘May it please your Lordship.’”

¹ *Latless v. Holmes*, 4 T. R. 660.

² Clayton, 158.

“IN an action of assumpsit for money due, the plaintiff laid it in his declaration to be payable upon request: and by his witness it did appear that a fortnight’s time was given for the payment of it, and though this fortnight’s time was given for the payment of it, and though this fortnight’s time was past long before this action was brought, yet now it was held a failure in the proof of the plaintiff of his case as he had laid it.”¹ The case of *Stanwood v. Scovel*, 4 Pick. 422, is similar both in facts and decision.



THE best definition of an indictment which the author has ever seen is that contained in the joint opinion of Lord Denman, at the time Attorney-General, and Sir William Horne, Solicitor-General: “The first principles of law require that the charge should be so preferred as to enable the court to see that the facts amount to a violation of the law, and the prisoner to understand what facts he is to answer or disprove.”²



THE advice given by Lord Coke in his commentary upon *Twyne’s* case in regard to “any gift of goods and chattels made in satisfaction of a debt” remains as good as ever, namely, “immediately after the gift take possession of them.”

¹ Clayton, 115.

² Forsyth Constitutional Law, p. 458.

THE style of some of the old reporters is admirable. Clayton reports this case: "Trespass. Plaintiff declares that the defendant did break his close and eat his grass etc. cum averiis suis, to wit, oxen, sheep, hogs, avibus, anglice turkies. And the judge did hold that turkies are not comprised within the general word 'averia,' which is an old law word, and these fowls came but lately into England:¹ and upon this it was directed to sever the damages, for otherwise if the damages shall be joyntly given, and it be ill for this of the turkies, for the reason above-said, it will overthrow all the verdict."²



IN a recent case in Pennsylvania,³ Mr. Justice Lewis thus discourses of a condition in a will in restraint of marriage: "The principle of reproduction stands next in importance to its elder-born correlative self-preservation, and is equally a fundamental law of existence. It is the blessing which tempered with mercy the justice of expulsion from Paradise. It was impressed upon the human creation by a beneficent Providence, to multiply the images of himself, and thus to promote his own glory and the happiness of his creatures. Not man alone, but the whole animal and vegetable kingdom are under an imperious

¹ Clayton's Reports were published in 1651.

² *Usley's Case*, p. 50.

³ *Commonwealth v. Stauffer*, 10 Penn. State Rep. 355.

necessity to obey its mandates. From the lord of the forest to the monster of the deep, from the subtlety of the serpent to the innocence of the dove, from the celestial embrace of the mountain kalmia to the descending fructification of the lily of the plain, all Nature bows submissively to this primeval law. Even the flowers which perfume the air with their fragrance, and decorate the forests and fields with their hues, are but ‘curtains to the nuptial bed.’ The principles of morality, the policy of the nation, the doctrines of the common law, the law of nature and the law of God, unite in condemning as void the condition attempted to be imposed upon his widow.”



MR. RICHARD WEST, afterwards Lord Chancellor of Ireland, gave a pithy opinion “On the Common and Statute Law applicable to the Colonies,” concluding, “Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear.”¹



IN some copies of the Second Part of Brownlow’s Reports there is a peculiar Preface, in others it is omitted; the reader may perhaps think it might as well have been omitted in all.

¹ Forsyth Constitutional Law, p. 1.

THE common law contains a general definition of forgery ; but the statute law has specified so many varieties of forgery that the offence at common law has been nearly superseded. Indeed, it would require great ingenuity to commit it without committing, at the same time, a statutory offence. The problem was perhaps solved by a man who painted the name of an eminent artist in the corner of a picture, in imitation of the original, in order to pass it off as an original picture by that artist. A case was reserved to determine whether the solution was sound. It was decided that he was not guilty of forgery.¹

The drawer of a check on a bank which was duly honored and returned to him by the bank, afterwards altered his signature in order to give it the appearance of forgery, and to defraud the bank and cause the payee of the check to be charged with forgery. The Court of Queen's Bench were of opinion that inasmuch as the alteration did not alter the legal effect of the document it did not amount to a forgery.²



PROFESSIONAL law-books are not generally esteemed as light reading. Ménage wrote a book on the amenities of the Civil Law, which does anything but fulfil its promise.³

¹ *Regina v. Closs*, Dearsly & Bell C. C. 460.

² *Britian v. Bank of London*, 11 W. R. 569.

³ Ménage (Gilles) *Juris Civilis Amœnitates*. Secunda editio. 8vo. Paris. 1677.

IN theory, the law looks upon the services of counsel as rendered gratuitously.¹ In practice, the client often takes the same view. Combine the two, and the profits arising from the practice of the law are easily computed. Compare Juvenal: —

Die igitur, quid causidicis civilia præsent
 Officia et magno comites in fasces libelli ?
 Veram deprendere messëm
 Si libet : hinc centum patrimonia causidicorum,
 Parte alia solum russati pone Lacernæ.

Sat. VII. 106 – 114.

Well, tell me then, what do the services rendered their fellow-citizens, and their briefs they carry about with them in a big bundle, bring in to the lawyers ? But if you like to calculate the actual harvest they reap, set in one scale the estate of a hundred lawyers, and you may balance it on the other side with the single fortune of Lacerna, the charioteer of the Red.



A MAN grants all trees in such a close, excepting one plump of oaks being eight in number, and there were nine of them, and the grantee did cut them all down, and that plump among the rest, and holden the exception abovesaid not good for the variance, but all did pass.²

¹ *Kennedy v. Brown*, 10 C. B. N. S. 677. Lord Nottingham held it to be maintenance in a barrister to contract to be paid in the event of success. *Penrice v. Parker*, Cases Temp. Finch, 75.

² *Clayton*, 119.

IN actions for slander it has been at all times the custom to preface the legal enunciation of the plaintiff's case with a preliminary panegyric upon his character; this is superfluous, since it does not affect the gist of the action. In one instance, indeed, it appears that in an action for calling the plaintiff a common whore, the announcing herself to be of good fame and honest reputation tempted the defendant to plead that at the time of publishing the words she was not of an honest reputation; but the plea was held to be bad, since it answered matter of inducement which did not require any answer.¹ In a modern case, the plaintiff in an action for a libel imputing to him seditious principles prefaced his declaration with a boast of the uniform loyalty of his conduct; it appeared he had been some time in confinement under the sentence of the court, for publishing a seditious libel; Lord Ellenborough animadverted on the impropriety and absurdity of such a preamble.²



IT was held to be slanderous to say of a barrister that he could not make a lease; whereas it was not slanderous to say of an attorney that he made false writings, because it was not his business to make writings.³

¹ Strachy's Case, Style, 118.

² 1 Starkie on Slander, 357, 2d ed.

³ 1 Rolle Ab. 54. Bac. Ab. Slander, B. 3.

CLAYTON, p. 34, reports this case: "The judge would not suffer a grand-juryman to be produced as a witness to swear what was given in evidence to them, because he is sworn not to reveal the secrets of his companions. See, if a witness is questioned for a false oath to the grand jury, how it shall be proved if some of the jury be not sworn in such case;¹ and in a case between Hitch and Mallet such a case was about an oath made before a grand jury, quære What became of it?"



FOR saying to the plaintiff's wife these words, "You had a bastard in London, and go thither and have another," and the judge held the action would not lie: but see because of the variance which may be in such case between the husband and his wife, which is damage etc.²



AN attorney cannot act on both sides, even with the consent of the parties.³ The court committed an attorney to the Fleet, and struck him off the roll, for accepting a retainer on both sides.⁴

¹ "Some of the jury" shall be "sworn in such case." *Commonwealth v. Mead*, 12 Gray, 167.

² Clayton, 73.

³ *Anon.* 7 Mod. 47.

⁴ *Simon Mason's Case*, Freeman, 74.

IN *Hilton v. Eckersley*,¹ the sole point was one purely of political economy, arising out of the Combination Laws. Some Lancashire mill-owners entered into a counter-combination against their men (who had combined to force their masters to yield to certain terms) not to open their mills for twelve months except on terms agreed to by the majority of such mill-owners. Whether this agreement of the masters was valid, was the subject of elaborate discussions in the Court of Queen's Bench, and the Court of Error. "I enter on such considerations," said Lord Campbell in delivering his judgment, "with much reluctance and apprehension, when I think how different generations of judges, and different judges of the same generation, have differed in opinion on questions of political economy, and other topics connected with the adjudication of such cases." The court held the agreement void, as contrary to public policy, in restraint of trade, and the free action of individuals; and the judgment was confirmed unanimously by a Court of Error. Compare this decision, says a very recent writer, and the enlightened principles on which the discussion was conducted, with the state of things existing formerly in the Legislature and on the Bench, as evidenced by the following passage in Lord Coke's Third Institute. Speaking of such "new manufacture as deserves a privilege," he proceeds: "There was a new invention found out here-

¹ 6 El. & Bl. 47. 24 L. J. N. S. Q. B. 352. 25 L. J. N. S. Q. B. 199.

tofore, that bonnets and caps might be thickened in a fulling-mill, by which means more might be thickened and fulled in one day than by the labors of fourscore men, who got their livings by it: It was ordained, *that bonnets and caps should be thickened and fulled by the strength of men, and not in a fulling-mill: for it was holden inconvenient to turn so many laboring men to idleness.*”



“**L**AW CASES. Special and Selected Law Cases, concerning the Persons and Estates of *all Men whatsoever*; collected out of the Reports and Year-Books of the Common Law of England. 4to. London: 1641.” “The title of this book,” writes Mr. Wallace, “certainly operates by way of *enlargement*.”



THERE is no court equal to the trial of the superior judges of the realm for facts done in judicature.¹ If judges in any court, said Lord Robertson,² were liable to be called to an account for words spoken in their judicial capacity, it may be said, in the words of Lord Stair, “No man but a beggar or a fool would be a judge.”

¹ Argument for the defendant in error in *Johnstone v. Sutton*, 1 T. R. p. 535. See *Randall v. Brigham*, 7 Wallace, p. 535.

² *Miller v. Hope*, 2 Shaw Appeal Cases, p. 134.

WHEN a verdict of guilty had been given against Lord Stafford, Lord Chancellor Nottingham, Lord High Steward, proceeded to pass sentence (according to the expression of Evelyn, who was present) "with greate solemnity and dreadful gravity." Lord Stafford then begged that he might no longer be kept a close prisoner as he had long been, and that his wife and children might be admitted to see him until his death.

LORD HIGH STEWARD. — "My Lord Stafford, I believe I may with my Lords' leave tell you one thing farther, that my Lords, as they proceed with rigour of justice, so they proceed with all the mercy and compassion that may be; and therefore my Lords will be humble suitors to the King, that he will remit all punishment *but the taking off your head.*"¹



MR. WALLACE adverts to a ludicrous blunder of Mr. Justice the Honorable St. George Tucker, of the Supreme Court of Appeals of Virginia, who sets aside Lord Hardwicke's censure of "Reports Tempore Finch," and supposes that Lord Nottingham was actually the author.² "This book has indeed," he says, "been dishonored as one of no authority. Whether for want of the imprimatur of the Lord Chancellor and Judges, formerly prefixed to

¹ 7 Howell State Trials, 1217-1558.

² The Reporters 20, 3d ed.

books of Reports, I cannot tell. But the name of *Sir Henric Finch, the author*, who is mentioned by Judge Blackstone as a person of the greatest abilities and most uncorrupted integrity, endued with a pervading genius, which enabled him to discover and pursue the true spirit of justice, may weigh against the opinion even of Lord Hardwicke, especially where this book is cited and relied on by other Judges.”¹



THE “Reports Temp. Finch” has been noted for a peculiarity, namely, that in all cases where the rule laid down or relied on by the judge differs from the corresponding rule of the Civil Law, the difference is noted in the margin.



SIR ROBERT FILMER published an advertisement to the jurymen of England touching witches. In this he shows the difference between a Hebrew and an English witch, and proves that the Devil is the principal, and the witch only an accessory before the fact. Now an accessory cannot be convicted before the principal is tried or outlawed upon summons for nonappearance; he could not be tried by his peers, who, if they could, would never convict him; and by the rules of the common law the Devil could never be summoned nor outlawed, and therefore a witch could not be tried.

¹ *Smith v. Chapman*, 1 Hening & Munford, 293.

ON the trial of Horne Tooke, having objected to a particular piece of evidence, he was reminded by Chief Justice Eyre, that, if there were two or three links in the chain, they must go to one first, and then to another, and see whether they amounted to evidence. The defendant demurred to this.

HORNE TOOKE. — I beg your pardon, my Lord, but is not a chain composed of links, and may I not disjoin each link, and do not I thereby destroy the chain?

EYRE C. J. — I rather think not, till the links are put together, and form the chain.

HORNE TOOKE. — I rather think I may, because it is my business to prevent the forming of that chain!



IT was not until 1695 that a statute was passed in England, which provided, among other things, that any person on trial for high treason “shall be received and admitted to make his full defence by counsel learned in the law.” The first instance on record in which we find counsel assigned under this statute is on the trial of Rookwood and others, on which occasion Sir Bartholomew Shower and Mr. Phipps defended the prisoners; and it is curious to observe in what deprecatory terms they separated themselves from their clients. “My Lord,” said Sir Bartholomew, addressing Chief Justice Holt, “we are assigned of counsel in pursuance of an Act of Parliament, and we hope that nothing which we shall say

in defence of our clients shall be imputed to ourselves. I thought it would have been a reflection upon the government and your lordship's justice, if, being assigned, we should have refused to appear: it would have been a publication to the world that we distrusted your candor towards us in our future practice upon other occasions. . . . We come not here to countenance the practices for which the prisoners stand accused, nor the principles upon which such practices may be presumed to be founded; for we know of none, either religious or civil, that can warrant or excuse them."¹ A cold exordium for the speech of an advocate!



AN imperative rule of pleading is thus tersely expressed: "An indictment ought to be certain to every intent, and without any intendment to the contrary."² The charge must be sufficiently explicit to support itself; there is no latitude of intention to include anything more than is charged.³



MR. JUSTICE MAULE observed that a man might by apt words bind himself that it shall rain to-morrow or that he will pay damages.⁴

¹ 13 Howell State Trials, 145.

² Cro. Eliz. 490.

³ 2 Burr. 1127.

⁴ *Canham v. Barry*, 15 C. B. p. 619. Quoted in the judgment in *Baily v. Crespigny*, Law Rep. 4 Q. B. p. 185, and 19 Best & Smith, p. 11.

WE give a few cases decided in the Star-Chamber. They are probably quite as valuable as a vast number of the modern decisions, and are certainly shorter and more entertaining. This court has everywhere of late times, and nowhere more than in our own Republican country, been the subject of unbounded abuse. Certainly it would be a curious thing to inquire how a tribunal composed of such men as it was — that is to say, of men like Coke, and Bacon, and Hobart, and Crewe, and Laud, and Yelverton — should have so utterly failed to commend their administration of justice to either their own or to any other day or land. Indeed, when we see what men filled the offices which are named in the statute constituting this court, it is impossible to conceive of a tribunal better able to discharge, or more certain to discharge with integrity, with justice, with decorum, with every sentiment of respect for the living and the dead, with all the regards that were due to the accused and the accuser, and with the many exquisite social considerations which the honor, the offices, and dignity of the persons frequently before it required at their hand, than a tribunal thus ordained; and that its deliberations were not with open doors, and that its powers were almost, in fact, unlimited, were reasons, one might say, *a priori*, why its judgments should give the nation satisfaction.

This particular topic — the degeneration of the Star-Chamber — itself makes a curiosity of the law;

and as much, perhaps, of the Bigarrures de l'Esprit Humain. It is one on which either Buckle or Scarron could exhaust their powers. We give a few cases, all of them from Hobart's Reports. As we read them, one cannot help thinking that Lords Bacon and Yelverton (whom Bacon styled a man of "*very* good parts," which made acquaintance between them on "first sight"), and other of the bright geniuses who adorned that age and court, must have been extremely amused at the questions which came occasionally before their consideration.

"The Lady Arabella," mentioned in the Countess of Shrewsbury's Case, which is one of those we give, was of course the Lady Arabella Stuart, and the "supposed child" was necessarily a matter of vast curiosity to the women, as well as of the most well-founded anxiety to the graver part of the nation, as involving directly the heirship of the Stuarts to the throne. Our ideas of the chivalrous notions of the Star-Chamber receive a sad abatement from one of the cases we present (*Tuften v. Nevill*), in which the court, while deciding that so delicate a matter as solicitation of chastity is not examinable even by *it*, yet intimates, most ungallantly, that a man, if compelled to answer on oath, might criminate a lady's virtue where he himself had been gratified by her regards. Very different was Sir Thomas Erskine's opinion, as will be recalled by every one familiar with his brilliant and beautiful speeches.

LORD DARCY *v.* MARKHAM.¹

THE Lord Darcy of the north sued Gervase Markham, esquire, in the Star-Chamber, and the case fell out to be thus: that they had hunted together, and the defendant and a servant of the plaintiff, one Beckwith, fell together by the ears in the field, and Beckwith threw him down and was upon him cuffing of him, and the Lord Darcy took him off and reproved his servant, and yet Markham chid him, charging him with maintaining his man. And the Lord Darcy replied, that he had used him kindly, for if he had not rescued him from his man, he had beaten him to rags. Whereupon Markham wrote five or six letters to the Lord Darcy, and subscribed them with his name, but sent them not, but dispersed them unsealed in the fields, whereof the effect was, that whereas the Lord Darcy had said, that but for him his man Beckwith had beat him to rags, he lied, and that he would maintain with his life; and then said, that he had dispersed those letters that he might find them, or somebody else might bring them to him; and concluded that if he were desirous to speak with him, that he should send his boy, and he should be well used. This cause was effectually handled at the common law, not enforced by the King's proclamation, because the defendant had no knowledge of the proclamation, nor by likelihood could have, it was so soon after the proclamation. But the plaintiff's

¹ Hobart, 120.

counsel, by direction of the court, left the proclamation, and yet Markham was censured and fined £ 500. The reason of the sentence was, that this was a compounded misdemeanor, for the letter thus dispersed was in the nature of a libel, slanderous and defamatory to my Lord Darcy; and the other point was, that though there were no direct challenge to my Lord Darcy to fight, yet there were plain provocations to it, and, as it were, to call and challenge my Lord Darcy to fight him. And though the case was something aggravated, that it was to a peer of the realm, yet the censuring of the fact rose out of the nature of it, and not out of the circumstances of the person.

MARSHALL *v.* STEWARD.¹

MARSHALL brought an action of the case against Steward, reciting the statute of 1 Jac. of invocation of foul spirits, (which was needless,) for speaking these words unto him: "The devil appears unto thee every night in the likeness of a black man, riding upon a black horse, and thou conferrest with him, and whatsoever thou dost ask him he doth give it thee, and that is the reason thou hast so much money." And after a verdict finding the words, the court gave judgment for the plaintiff.

WRENHAM'S CASE.²

YELVERTON, attorney-general, informed in the Star-Chamber, *ore tenus*, against John Wrenham, for a

¹ Hobart, 129.

² Hobart, 220.

complaint by him exhibited against Sir Francis Bacon, Lord Chancellor, to the King, in a book containing a scandalous censure of a decree made by the said Lord Chancellor against him, for one Sir Edward Fisher. In the sentencing of which case it was resolved by the whole court that it was lawful for any subject to petition the King for redress, in an humble and modest manner, where he finds himself grieved by a sentence or judgment, — for access to the sovereign must not be shut up in case of the subject's distresses; but on the other side, it is not permitted, under color of a petition and refuge to the King, to rail upon the judge or his sentence, and to make himself judge in his own cause, by prejudging it before the rehearing (for which his suit to the King should be), which Wrenham in this case did, through his whole book, with the most desperate boldness and despiteful and virulent words that was possible. It was also resolved, that the injustice of the decree was not to be questioned in this case; for that was not the point now examinable; though in that it did appear that he had done my Lord Chancellor much and great wrong. So he was censured a thousand pounds fine.

TUFTON *v.* NEVILL.¹

SIR HUMPHREY TUFTON exhibited a bill etc. against Master Christopher Nevill, son to the Lord Aburga-

¹ Hobart, 195.

venny, for a riot, and laid by way of inducement, that Nevill had solicited his wife to in chastity both before and since his marriage with her; and that this being made known unto him by his wife, he caused her to write letters to the defendant, giving him hope of her inclination, and appointing him a time by night, and place; at which the defendant coming, (and the plaintiff, with a man disguised like a woman being there expecting as much,) the defendant and others in this company made a riot upon him and his company.

To this the defendant, as to the riot *answered*; but as to the solicitation of the lady's chastity *demurred*.

Whereupon, motion being made in court, though there were some of another mind, yet it was RESOLVED and RULED that the defendant's demurrer was good; and though it was urged that this inducement served very much both to aggravate the defendant's riot and to justify the plaintiff's train, yet the point of itself was naturally of another jurisdiction, and for the spiritual, whose proceeding in this case was not to be usurped nor prevented. Besides, the fault of solicitation is of so uncertain acceptation, as is not fit to be here examined. And, lastly, to examine such a fault by the oath of the delinquent is not allowable by us, being a delict that *we* cannot censure. And it may prove scandalous in the event if the defendant should upon his oath (which were in him excusable if the court should *constrain* his answer)

criminate the lady, were it true or false ; for that could never be satisfied, being a point so secret as solicitation only.

HICKS'S CASE.¹

ONE sent a letter closed and sealed up to Sir Baptist Hicks, which was so delivered to his hands, containing many despitelful scandals delivered ironice, as saying, " You will not play the Jew nor the hypo-crite." and in that sort taunting him for an almshouse, and certain good works that he had done ; all which he charged him to do for vainglory. Whereupon Sir Baptist Hicks sued him in the Star-Chamber. And now upon the hearing it was resolved, that, though it were not proved that the defendant had any way published it, yet the court would hold plea of it, and so did, and fined the defendant, and sentenced him to wear papers, and to make his submission to Sir Baptist Hicks in Cheapside. Yet an action of the case will not lie in that case, for want of publication ; but the King and Commonwealth are interested in it, because it is a provocation to a challenge, and breach of the peace.

COUNTESS OF SHREWSBURY'S CASE.²

THE Countess of Shrewsbury was fined ten thousand pounds and committed to the Tower, for that, being called to the Council Table and interrogated what she

¹ Hobart, 215.

² Hobart, 235.

knew, *or had heard or thought*, of a supposed child which it was rumored that Lady Arabella should have had, she refused, obstinately, to make any answer, for it was judged that this was a question of State. For there is not one thing that doth more concern the peace of a kingdom than the certainty of the royal line; insomuch as suppositious persons have raised as great commotions and troubles in States as the discords of true heirs and descendants,—as in the case of Perkin Warbeck, he at home; and counterfeit Sebastian of Portugal, and many others. . . . The lady was the more pressed to answer this matter, because, being more familiar and inward with the Lady Arabella than any other, she must needs have falsified the rumor; *for all men of understanding held it to be untrue.*

TRASKE'S CASE.¹

ONE John Traske, a minister that held opinion that the *Jewish* Sabbath ought to be observed, and not *ours*, and that we ought to abstain from all manner of swine's flesh; being examined upon these things, he confessed that he had divulged these opinions and had labored to bring as many to his opinion as he could; and had also written a letter to the King wherein he did seem to tax his Majesty of hypocrisy, and did expressly inveigh against the Bishop's High Commissioners as bloody and cruel in their proceed-

¹ Hobart, 236.

ings against him and a papal clergy. Now he being called ore tenus, was sentenced to fine and imprisonment — not for holding these opinions, for these were examinable in the Ecclesiastical Courts, and not here, but — for making of conventicles and factions by that means, which may tend to sedition and commotion, and for scandalizing the King, the bishops, and the clergy.

COUNTESS OF EXETER v. LADY ROSS.¹

IN the great cause between the Countess of Exeter, the Lady Ross, and others, because the Lady Ross and one Sarah Swarton, her maid, had charged the Countess of Exeter, that she had delivered unto the said Lady Ross at Wimbleton, at the Earl's house, in a certain chamber there, a paper written and signed by herself (as she said), containing a confession of certain foul faults, and a submission thereupon, which was showed unto the King; his Majesty commanded Serjeant Crew and the Serjeant Moore, of counsel of either side, to go to Wimbleton, and there, in the same chamber, to examine the Lady Ross and Swarton, upon all such things as, upon their view of the place, they might judge likely to discover the truth or falsehood of the same matter; which they did accordingly, without oath. Now the same persons being afterwards examined in court as defendants, upon all things that the plaintiffs listed; they did further

¹ Hobart, 236.

examine them upon interrogatories, whether that declaration which they had made at Wimbledon before the two serjeants were true or not; but they did not show them that declaration now; whereupon they answered that they were true.

Now, upon motion in open court, it was resolved that these examinations were not well taken; for no man is bound by an examination in court, till first he have advisedly read, perused, and corrected it, as he sees cause, and then finally concluded it. Therefore, this being first taken without oath, there was no reason to bind them to it by a new oath by memory without review, and therefore by order it was suppressed. Nevertheless, because it was like that the said examination might serve the better to discover truth, it was ordered that the same their declarations should be showed them, and they re-examined upon them. And so they were.



STAR-CHAMBER CASES. We print a few cases from this scarce volume. Their brevity is certainly commendable.

“Note that one G. writes his letter to a juror to appear between L. and C. D. and to do his conscience, and he was fined at twenty pounds here, because he had nothing to do in the matter, circa 27 Eliz. Here note that no man ought to meddle in any matter depending in suit where he hath nothing to do.”

“One L. O. of Kent was punished in the court for

falsely going about to prove one that was his cousin or brother to be a traitor, and for this he was adjudged to ride about Westminster Hall with his face to the horse-tail, circa 27 Eliz. as I heard."

"Note that one S. of the county of Lancaster for falsely procuring one to be indicted for the death of another, was fined in this court to a great sum, circa 31 Eliz."

"A Knight of the county of Northumberland was fined in a great sum in the Star-Chamber, because he permitted a seditious book called Martin Marprelate to be printed in his house, 32 Eliz."

"One writes to a justice of the peace to send him his warrant with a blank, to put in one he would attach upon a suspicion of felony, and so the justice did, and because he sent his warrant with a blank to put in the name of one he knew not, neither the matter, before the making of his warrant, he was fined in this court, circa 30 Eliz.; and it was one Sir J. R."

"A woman great with child, which was suspected of incontinency without cause, was commanded to be whipped in Bridewell, London, by the Masters there; and because she fell to travail before her time etc. they were for this fined in this court at a great sum. And by order of the court it was awarded that they should pay a certain sum to the said woman, about the 31 of Eliz. See the proceedings there concerning this matter the year aforesaid, set down more at large."

"A justice of the peace was put out of commission

by order of this court, for because he refused to take the peace of one who came to him, and offered him surety for the peace, because the justice which did award the warrant was not his friend, for which reason he refused to go before him to be bound to the peace."



IN a recent case in the Supreme Court of the United States, the whole business of making hats, from the disintegrating of the fur to the production of a hat-body, was actually carried on and exhibited in the court-room; and the printed *argument* of counsel contained, as "exhibits," the skin of the beaver as it comes from the animal, with specimens of fur as thus exhibited, and also as exhibited in various conditions and processes, down to the very surface of the "brush" and "napped" hats. "No similar argument," says the reporter, "perhaps, was ever made in any court of law; nor could a case be explained in a manner more satisfactory."¹



MR. JUSTICE PUTNAM thus spoke of the power of compression and discrimination of Chief Justice Parsons: "As light and spongy fabrics are reduced to portable size by hydraulic pressure, so the verbose readings of the law were, by the force of his great mind, reduced to clear, practical rules."²

¹ *Burr v. Duryee*, 1 Wallace, 531.

² *Deblois v. Ocean Insurance Co.*, 16 Pick. p. 319.

UPON the hearing of a petition before Vice-Chancellor Kindersley, the death of Lord Byron, the poet, was a material fact in the petitioner's title; but it being assumed that the court would take judicial notice of a fact which was well known to the whole world, no evidence was adduced upon the subject.¹ Counsel observed that his lordship having died in Greece, there would probably be some difficulty in obtaining the kind of evidence which the court ordinarily required. The Vice-Chancellor, however, declined to make the order, except upon the production of the usual evidence, for which purpose the petition stood over. This is a curious instance of adherence to a strict general rule of evidence, and the more so as the close connection between the families of the Vice-Chancellor and the poet might be supposed to give the court additional reason for dispensing with evidence of a fact which is a part of the history of the world.



A LUDICROUS attempt was made in a recent case² to fabricate a consideration. A father held a promissory note of his son, who had teased him with complaints of not having received so much money or so many advantages from his father as his other children, as, it was alleged, the father had admitted;

¹ The hearing was in 1862. Lord Byron died in 1824.

² *White v. Bluett*, 23 L. J. N. S. Exch. 36.

and that he had agreed, that, if his son would cease forever to make such complaints, he should be absolved from payment of the note. The father died, and his executor, finding the note among the testator's papers, sued the son upon it at law; and he pleaded the facts as an answer to the action. The plea was demurred to as showing no consideration; and the son's counsel endeavored to support his case by alleging that he had a right to make the complaints alleged, and had subjected himself to a *detriment*, by not being able to continue his ill-founded complaints! The court contemptuously dismissed the plea. Baron Parke sarcastically asked, "Is an agreement by a father, in consideration that his son will not *bore* him, a binding contract? "By the argument," said the Lord Chief Baron, "a principle is pressed to an absurdity, as a bubble is blown until it bursts. . . . Looking at the words merely, there is some foundation for the argument; and following the words only, the conclusion may be arrived at. In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no *consideration*."



IN "Star-Chamber Cases," perjury, more quaintly than accurately, is thus defined: "Perjury is a lie confirmed by oath."

THE following are specimens of the legal nomenclature of Westminster Hall.

“In fernedon the tenant having demanded a view after a general imparlance, the demandant issued a writ of petit cape — held irregular.”

Also : “If, after nulla bona returned, a testatum be entered upon the roll, quod devastavit, a writ of inquiry shall be directed to the sheriff, and if by inquisition the devastavit be found and returned, there shall be a scire facias quare executio non de propriis bonis, and if upon that the sheriff returns scire feci, the executor or administrator may appear and traverse the inquisition.”

Again : “If the record of Nisi prius be a die Sancti Trinitatis in tres Septimanas nisi a 27 June, prius venerit, which is the day after the day in Bank, which was mistaken for a die Sancti Michaelis, it shall not be amended.”



IT is curious to observe how bitter a prejudice Themis has against her own humbler ministers. Most of the bitterest legal jokes are at the expense of the class who have to carry the law into effect. Take, for instance, the case of the bailiff who had been compelled to swallow a writ, and, rushing into Lord Norbury's court to proclaim the indignity done to justice in his person, was met by the expression of a hope that the writ was “*not returnable* in this court.”

“**I** LEAVE behind me,” wrote Lord Campbell, “thirteen huge volumes (XV. to XVIII. of Adolphus and Ellis, and I. to IX. of Ellis and Blackburn) of Queen’s Bench Reports, chiefly filled with my judgments while I presided in the Queen’s Bench. But from the portentous multiplicity of law Reports now published, there seems almost a certainty of all the judgments of every judge, however eminent, being speedily smothered. The whole world is now insufficient to contain all the law Reports which are published. I remember the time when one good-sized bookcase would hold all the books worth consulting—from the Year Books to the last number of the Term Reports. What is the remedy? Perhaps a decennial *auto da fè*.”



LUTWYCHES REPORTS were edited in 1718 by W. Nelson. In the Preface this whimsical annotator, speaking of the subtlety and obscurity with which the science of pleading was invested, observes: “Here we may see what artificial fencing there is between replications and rejoinders, till an end is put to the strife by some general or special demurrer,—and abundance more of such cobweb subtleties, spun so very fine by the spiders of the law, that one would think it done on purpose to let justice fall through.”

¹ Life of Lord Campbell, Vol. II. pp. 383, 384.

ON the supposition that there are few readers who, like Lord King, can boast of having read the Statutes at Large through, we venture to give a title of an Act—a title only, remember, of one of the bundle of acts passed in one session—as an instance of the comprehensiveness of English statute law, and the lively way in which it skips from one subject to another. It is entitled—

“An Act to continue several laws for the better regulating of pilots, for the conducting of ships and vessels from Dover, Deal, and the Isle of Thanet, up the River Thames and Medway; and for the permitting rum or spirits of the British sugar plantations to be landed before the duties of excise are paid thereon; and to continue and amend an Act for preventing fraud in the admeasurement of coals within the city and liberties of Westminster, and several parishes near thereunto; and to continue several laws for preventing exactions of occupiers of locks and wears upon the River Thames westward; and for ascertaining the rates of water-carriage upon the said river; and for the better regulation and government of seamen in the merchant service; and also to amend so much of an Act made during the reign of King George I. as relates to the better preservation of salmon in the River Ribble; and to regulate fees in trials and assizes at nisi prius” etc. But this gets tiresome, and we are only half-way through the title after all. If the reader wants the rest of it, as also

the substantial Act itself, whereof it is the title, let him turn to the 23d of Geo. II. ch. 26.

No wonder, if he anticipated this sort of thing, that Bacon should have commended "the excellent brevity of the old Scots acts." Here, for instance, is a specimen, an actual statute at large, such as they were in those pygmy days: —

"Item, it is statute that gif onie of the King's lieges passes in England, and resides and remains there against the King's will, he shall be halden as Traiter to the King."

Here is another, very comprehensive, and worth a little library of modern statute-books, if it was duly enforced: —

"Item, it is statute and ordained, that all our Sovereign lord's lieges being under his obeisance, and especially the Isles, be ruled by our Sovereign lord's own laws, and the common laws of the realm, and none other laws."



"DESCENDERE, to descend or to spring of one's body; hereupon they which are born of us are called by the name of descendants, which with them that ascend make the right line, and the ascendants and descendants cannot marry together, wherefore, if Adam were now living, he could not marry a wife." ¹

¹ Fulbecke Study of the Laws, p. 293.

ON the trial of the Seven Bishops, during the argument of the Solicitor-General who was of counsel for the King, Mr. Justice Powell observed to the Lord Chief Justice, "My Lord, this is wide. Mr. Solicitor would impose upon us: let him make it out, if he can, that the King has such a power, and answer the objections made by the defendants' counsel." Lord Chief Justice: "Brother, impose upon us! He shall not impose upon me; I know not what he may upon you; for my part, I do not believe one word he says."¹



THE law does not recognize the dreams, visions, or revelations of a woman in a mesmeric sleep as necessities for a wife, for which the husband, without his consent, can be held to pay. These are fancy articles, which those who have money of their own to dispose of may purchase, if they think proper; but they are not necessities, known to the law, for which the wife can pledge the credit of her absent husband."²



I REMEMBER," writes Lambard, "that, not many years since, women were punished in the Star-Chamber, and that worthily, for that, having put off their seemly shamefacedness and apparelling themselves in the attire of men, they assembled in great number, and riotously pulled down an enclosure."³

¹ 12 Howell State Trials, 183.

² Judgment in *Wood v. O'Kelley*, 8 Cush. p. 408.

³ Eirenarcha, 179, A. D. 1581.

LORD DENMAN, delivering judgment in the House of Lords, in a celebrated case, took occasion to remark, that a large portion of the *legal opinion* which has passed current for law falls within the description of “law taken for granted”; and that, “when, in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine — the mere repetition of the *cantilena* of lawyers — cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle.”¹



IN a recent case in Indiana, after the jury had retired to deliberate upon their verdict, the bailiff, without the consent of the defendant, or the leave of the court, furnished to them, at their request, a volume of Bishop's Criminal Law. This was held to be misconduct, both on the part of the officer and the jury, and such as to entitle the defendant to a new trial.²



LUCATUS error nuda veritate in multis est probabilior et saepenumero rationibus vincit veritatem error. — 2 Rep. 72 *b*.

¹ *O'Connell v. The Queen*, 11 Clark & Finnelly, p. 373. And see per Pollock, C. B., 2 H. & N. 139.

² *Newkirk v. The State*, 27 Indiana, 1.

DISSENTING opinion of Mr. Justice Livingston in *Pierson v. Post*:¹—

“ My opinion differs from that of the court. Of six exceptions taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

“ Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away ?

“ This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited ; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal the correction of any mistake which we may be so

¹ 3 Caines, 175, 180.

unfortunate as to make. By the pleadings it is admitted that a fox is a 'wild and noxious beast.' Both parties have regarded him, as the law of nations does a pirate, '*hostem humani generis*,' and although '*de mortuis nil nisi bonum*' be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barnyards have not been forgotten; and to put him to death wherever found is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal so cunning and ruthless in his career. But who would keep a pack of hounds? or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, '*sub jove frigido*,' or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his Code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this

cause, 'with hounds and dogs to find, start, pursue, hunt, and chase' these animals, and that, too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his Institutes would have taken care not to pass it by without suitable encouragement. If anything, therefore, in the Digests or Pandects shall appear to militate against the defendant in error, who on this occasion was the fox-hunter, we have only to say *tempora mutantur*; and if men themselves change with the times, why should not laws also undergo an alteration?

"It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favored us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of Barbeyrac as the most rational, and least liable to objec-

tion. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving offence to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained that if a beast be followed with large dogs and hounds, he shall belong to the hunter, not to the chance occupant; and in like manner if he be killed or wounded with a lance or sword; but if chased with beagles only, then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

“Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of imperial stature, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of Barbeyrac, that property in animals *feræ nature* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking what he has thus discovered, an intention of converting to his own use.

“When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a

beast so pernicious and incorrigible, we cannot greatly err in saying that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession or bodily seisin, confers such a right to the object of it, as to make any one a wrong-doer who shall interfere and shoulder the spoil."



THE following case is curiously suggestive of the state of the country round London in the days when much business was done on the road:¹ A bill in the Exchequer was brought by Everett against a certain Williams, setting forth that the complainant was skilled in dealing in certain commodities, "such as plate, rings, watches etc.," and that the defendant desired to enter into partnership with him. They entered into partnership accordingly, and it was agreed that they should provide the necessary plant for the business of the firm — such as horses, saddles, bridles etc. (pistols not mentioned) — and should participate in the expenses of the road. The declaration then proceeds, "And your orator and the said Joseph Williams proceeded jointly with good success in the said business on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the said Joseph Williams told your orator that Finchley in the county of Middlesex was a good and convenient place to deal in, and that commodities

¹ The Book-Hunter, p. 138.

were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the said Joseph Williams informed your orator that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which, he believed, might be had for little or no money; that they accordingly went, and met with the said gentleman, and, after some small discourse, they dealt for the said horse etc. That your orator and the said Joseph Williams continued their joint dealings together in several places — viz., at Bagshot in Surrey, Salisbury in Wiltshire, Hampstead in Middlesex, and elsewhere — to the amount of £2,000 and upwards.”¹



AN action was tried before Lord Holt on a wager whether a person playing at backgammon, having stirred one of his men without moving it from the point, was bound to play it, and that venerable judge called in the assistance of the groom porter to decide the controversy.²

¹ This case has been often referred to in law-books, but I have never met with so full a statement of the contents of the declaration as in the *Retrospective Review*, Vol. V. p. 81.

² *Pope v. St. Leger*, 1 Salk. 344.

LORD RAYMOND thus concludes the report of a celebrated case: "Note, that this judgment was very distasteful to some Lords; and therefore the Lord Chief Justice Holt was summoned to give his reasons of this judgment to the House of Peers, and a committee was appointed to hear and report them to the House, of which the Earl of Rochester was chairman. But the Chief Justice Holt refused to give them in so extrajudicial a manner. But he said that if the record was removed before the Peers by error, so that it came judicially before them, he would give his reasons very willingly; but if he gave them in this case, it would be of very ill consequence to all judges hereafter, in all cases. At which answer some Lords were so offended that they would have committed the Chief Justice to the Tower. But, notwithstanding, all their endeavors vanished in smoke."¹



THE bar and the public would be astonished, at the present day, to hear one of the learned judges of the Court of Queen's Bench, in giving judgment in some important case, pursue a line of observation similar to that which we find in the decision of that court in a once celebrated case.² Mr. Justice Catline, speaking of a fine, levied in pursuance of the 4 Henry VII., compared it to "Janus, who, he said, was Noah, but the Romans occasionally called him Janus, and used to paint him

¹ 1 Ld. Raym. 10, 18.

² *Stowe v. Lord Zouch*, Plowden, 353.

with two faces, — one looking backwards, in respect that he had seen the former world, which was lost by the flood, and the other looking forwards, — for which reason they called him Janus bifrons. And also he carried a key in his hand, his power to renew the new world by his generation. So here the act creates, as it were, a flood, by which all former rights before the fine shall be drowned by non-claim, for non-claim is the flood, and the fine begets a new generation, which is the new right, for the fine makes a new right and is the beginning of a new world, which proceeds from the time of the fine downwards.”



IN Mr. Bishop's excellent book on Criminal Procedure¹ is this passage : —

“What the lawyers of our day most need, while descending from the clear heights of legal principle to the vale below on a fast-whirling avalanche of decisions, is to be made cognizant, before it is too late, of the *law of the motion* of the avalanche, in order to strike uppermost when it breaks, instead of being crushed and ground to powder beneath. Unhappily, most do not perceive, at present, that the avalanche is ever to break, or ever to stop, or ever to turn. If Scripture might be quoted in a law-book, the author would say : ‘He that hath an ear to hear, let him hear.’ This hint is meant to be read only by those who have ears.”

¹ Vol. II. § 413.

IT is a remarkable thing that a man should be sentenced "to stand in the pillory, lose his ears, pay a fine of £5,000 and be perpetually imprisoned in a distant fortress," and become one of the chief causes of great civil wars, on account of an unfortunate word or two in the last page of a book containing more than a thousand. It was as far down in his very index as "W" that the great offence in Prynne's *Histrio Mastyx* was found, under the head "Women actors notorious whores."¹ It was a very odd compliment to Queen Henrietta Maria to presume that these words must refer to her. The *Histrio Mastyx* was, in fact, so big and so complex a thicket of confusion, that it had been licensed without examination by the licenser, who perhaps trusted that the world would have as little inclination to peruse it as he had. The calamitous discovery of the sting in the tail must surely have been made by a Hebrew or an Oriental student, who mechanically looked for the commencement of the *Histrio Mastyx* where he would have looked for that of a Hebrew Bible. Successive licensers had given the work a sort of go-by, but, reversing the order of the sibylline books, it became always larger and larger, until it found a licenser who, with the notion that he "must put a stop to this," passed it without examination. It got a good deal of reading immediately afterwards, especially from Attorney-General Noy, who asked the Star-

¹ 3 Howell State Trials, 725.

Chamber what it had to do with the immorality of stage-plays to exclaim that church-music is not the noise of men, but rather “a bleating of brute beasts, — choristers bellow the tenor as it were oxen, bark a counterpoint as a kennel of dogs, roar out a treble like a set of bulls, grunt out a bass as it were a number of hogs.” But Mr. Attorney took surely a more nice distinction when he made a charge against the author in these terms: “All stage-players he terms them rogues: in this he doth falsify the very Act of Parliament; for *unless they go abroad*, they are not rogues.”



BY St. 1 Car. I. ch. 1, no persons shall assemble, out of their own parishes, for any *sport* whatsoever, on Sunday; nor, in their parishes, shall use any *bull or bear baiting*, interludes, plays, or other unlawful exercises or pastimes. “The Puritans hated bear-baiting,” wrote Macaulay, “not because it gave pain to the bear, but because it gave pleasure to the spectators.”¹



IN Chndleigh’s Case one of the judges drew a parallel between Nebuchadnezzar’s tree and the Statute of Uses.²

¹ History of England, Vol. I. ch. 2. Even bear-baiting was esteemed heathenish and unchristian; the sport of it, not the inhumanity, gave offence. Hume History of England, Vol. I. ch. 62.

² 1 Rep. 1346.

AT the commencement of the reign of Edward VI. an act was passed from which no very favorable inference can be drawn as to the morals, habits, or accomplishments of the English nobility in the middle of the sixteenth century. Housebreaking by day or by night, highway robbery, horse-stealing, and the felonious taking of goods from a church, having been made capital offences, it was provided "that any Lord or Lords of the Parliament (to include Archbishops and Bishops), and any Peer or Peers of the realm having place and voice in Parliament, being convicted of any of the said offences for the first time, upon his or their request or prayer, *though he cannot read*, be allowed benefit of clergy, and be discharged without any burning in the hand, loss of inheritance, or corruption of blood." It seems strange to us, says Lord Campbell, that this privilege of peerage should have been desirable, or should have been conceded; but it continued in force till taken away by an act passed after the trial of Lord Cardigan in the reign of Queen Victoria.¹



ONE was ordered by the judge of assize to be hanged in chains; the officer hung him in *privato solo*; the owner brought trespass; and upon not guilty the jury found for the defendant, and the court would not grant a new trial, it being done for

¹ Lord Campbell *Lives of the Chancellors*, Vol. II. p. 169.

convenience of place, and not to affront the owner.¹ Holt Chief Justice: "If a man be hung in chains upon my land, after the body is consumed, I shall have gibbet and chain."²



MR. JUSTICE REDFIELD thus speaks of the celebrated case of *Cornfoot v. Fowke*:³ "This case is certainly a most remarkable instance of self-delusion, brought about by the severity of one's own discriminations. Lord Abinger, who dissented from the opinion of the majority of the judges, seems to have readily comprehended the delusion under which his brethren were laboring, as indeed he always did all intricacies of thought and language." And after stating the opinion of the majority of the court in *Cornfoot v. Fowke*, he continues: "One is almost compelled to doubt if indeed these men⁴ can be serious. It almost strikes the mind as matter of mere badinage. It is scarcely surpassed, in its ethical or metaphysical acumen, by the sophistry of the ancient schoolmen, by which it was attempted to be proved, by syllogistic reasoning, that in a foot-race Hercules never could overtake the lobster."⁵

¹ *Sparks v. Spicer*, 2 Salk. 648.

² 1 Ld. Raym. 738.

³ 6 M. & W. 358. This case, though questioned, has never been overruled.

⁴ "These men" were Baron Rolfe, Baron Alderson, and Baron Parke.

⁵ The learned judge probably had a dim recollection of the story of Achilles and the tortoise.

IN Fuller's "Worthies" are quaint descriptions of the "men of the law":—

COKE. — His most learned and laborious works on the laws will last to be admired by the judicious posterity whilst Fame hath a trumpet left her, and any breath to blow therein.

PLOWDEN. — How excellent a medley is made, when honesty and ability meet in a man of his profession!

ST. GERMAIN. — Reader, wipe thine eyes, and let mine smart, if thou readest not what richly deserves thine observation; seeing he was a person remarkable for his gentility, piety, chastity, charity, ability, industry, and vivacity. . . . Witness his book called "The Doctor and Student," where the former vies divinity with the law of the latter.



IN Massachusetts it is still an open question, whether if a whale happened to be stranded on the shore on the Lord's day, it would be lawful to work on that day to capture him.¹ But it is settled that an averment that the defendant hoed "in his field" on the Lord's day is supported by evidence that on that day he hoed "in a field in a part of his garden."²

¹ Commonwealth v. Sampson, 97 Mass. p. 410.

² Commonwealth v. Josselyn, 97 Mass. 411.

IN Brownlow Redivivus, p. 505, there is a singular entry. The marginal note runs thus: "Count per la Coachmaker's Widow vers le Frenchhome. Eo quod defendens simul cum etc. in querentem insultum fecit, et ipsam intoxicavit, et ad lectum ei ignotum adduxit, et illam super lectum istum deposuit, et in isto lecto cum querenti contra voluntatem suam impudenter recubuit, et se intrusit."



RAITHBY'S Edition of Vernon's Reports. There is a famous dedication "with a double aspect," of this book to Lord Eldon, by the editor, who, after obtaining permission to dedicate it to him, and before the book was published, seeing his intended patron suddenly turned out of office, after some compliments to departing greatness, says, "but your felicity is that you contemplate in your successor (Lord Erskine) a person whose judgment will enable him to appreciate your merits, and whose talents have procured him a name among the eminent lawyers of his country."



VESEY JUNIOR. "I knew this gentleman well," says Lord Campbell. "When near eighty he was still called 'Vesey Junior,' to distinguish him from his father, 'Vesey Senior.'"

BRACTON accounts for the old rule of law, "that inheritance may literally descend, but not ascend," upon the principle of gravitation, — the bowl rolls down the hill, but never rolls up. Littleton thus explains the doctrine of "hotchpot": "It seemeth that this word 'hotch-pot' is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together."



AN old law-tract assumes to give in this simple language the origin of the tenancy by the law, or courtesy of England: "It was called the law of England because it was invented in England on behalf of poor gentlemen who married gentlewomen, and had nothing wherewith to support themselves after their wives' death."



FEW cases are more laughable than that which describes the arithmetical process by which Baron Perrot arrived at the value of certain conflicting evidence. "Gentlemen of the jury," this judge is reported to have said, in summing up the evidence in a trial where the witnesses had sworn with noble tenacity of purpose, "there are fifteen witnesses who swear that the watercourse used to flow in a ditch on the north side of the hedge. On the other hand, gentlemen, there are nine witnesses who swear that

the watercourse used to flow on the south side of the hedge. Now, gentlemen, if you subtract nine from fifteen, there remain six witnesses wholly uncontradicted; and I recommend you to give your verdict for the party who called those six witnesses."



A CERTAIN earl, having estates in Sussex, *Gloucester*, and elsewhere, gave instructions to his solicitor to prepare a will, which was, inter alia, to give to his surviving countess a life estate in his estates in Sussex and *Gloucester*. The solicitor prepared a written will, in conformity with his noble client's instructions, and laid it before, to be settled by, a no less eminent conveyancer than the late accomplished and learned Mr. Butler. In due time the will was returned by him; and, having been fairly copied out, was taken by the solicitor to his client to be executed,—the solicitor having also with him the abstract of the will as originally prepared. *This only*, and not the fair copy brought to be executed, was read; and as it represented that a life-estate had been given to the countess, in conformity with the earl's intention, as well in the *Gloucester*, as the Sussex estate, he executed his will, believing it to be in exact conformity with the abstract; and in that belief he died. But behold! it turned out that by some accident the word "*Gloucester*" had been struck out by the great conveyancer; and the person making the

fair copy of the will not only omitted the word "Gloucester," but changed the word "counties" into "county," doubtless conceiving that he thereby carried out precisely the intention apparent in the draught! Thus the will was a total blank as to the Gloucester estate, which was worth nearly £14,000 a year! The consternation of all parties, but especially of countess, conveyancer, and solicitor, may be imagined; and two suits¹ were forthwith instituted before the then Vice-Chancellor, Sir John Leach, — one by the new earl, for the execution of the trusts as they actually appeared on the face of the will; and the other by the dowager countess, praying that the mistaken omission of her life-estate in the Gloucester estate might be rectified, and that the trust might be executed as so rectified. The Vice-Chancellor refused to admit the tendered evidence of that mistake, though, on a rehearing, it was shown by the distinguished conveyancer himself how the purely clerical error had been committed;² and his refusal was sustained by the unanimous opinion, delivered by the late Lord Tenterden, of the judges summoned to assist the House of Lords; which decided in conformity with that view, on a thoroughly established principle as to the non-admissibility of such evidence for such a purpose. It would render all written wills and instruments worthless; opening the door to those endless frauds and

¹ The Earl of Newburgh v. Countess Dowager of Newburgh, 5 Madd. 364.

² 5 Madd. 367.

perjuries which it had been one great object of the Statute of Frauds to prevent. "To assume such a jurisdiction," said the court, "would be to repeal the Statute of Frauds in all cases of failure, by mistake or accident, to comply with it. To admit parol evidence, under such circumstances, of the devisor's *intention*, it was the very object of the statute to prevent."¹



IN *Stokes v. Heron*² the decision turned upon the rule in *Wild's Case*, 6 Coke's Reports, 166. Sir Edward Sugden considered that Lord Plunket misapprehended the nature of this rule. Lord Brougham, in delivering his opinion in the House of Lords, said: "Lord Plunket was perfectly accurate, as accurate as it was possible to be, in his reference to the case; Sir Edward Sugden thought him wrong, probably by looking to the margin instead of the case." Sir Edward Sugden, in reference to this observation, says: "The learned Lord Brougham actually confounded

¹ *Miller v. Travers*, 8 Bing. 254. This was a case of an error precisely similar to that mentioned in the text, and was attended with the like disastrous results. A testator executed a will, under the impression that it contained a devise of, amongst others, "his estates in the *county of Clare*," in accordance with his instructions, and with the draught of the will, which had been sent to a conveyancer, to make certain alterations not affecting the estates in question. By an unfortunate and undetected mistake, he had erased the critical words, "*county of Clare*", the will, as executed, consequently omitted them; and parol proof of these facts was rejected, on the principle stated in the text.

² 12 Clark & Fennelly, 161.

the *decision* in Wild's Case with the *resolution*, which was probably a dictum invented by Lord Coke himself"; and adds, "The only edition of Coke's Reports that Sir Edward Sugden ever had is one in which there are no marginal notes."



ONE of the most remarkable instances on record where the degree of impunity to which counsel are entitled in the exercise of their profession came in question, occurred in the trial of John Cook, one of the regicides. He had acted as solicitor-general for the Commonwealth during that solemn mockery of justice when John Bradshaw, serjeant-at-law, sat as judge upon his king; and in that capacity he had prayed that speedy judgment might be pronounced against Charles I., whom he styled "the prisoner at the bar." When tried for high treason, he adroitly attempted to excuse himself on the ground that he had no participation in the king's death,—not having formed part of the court which condemned him, and having merely discharged, *for his fee*, the duty of a counsel. And to get rid of the objection that he had demanded the judgment of the court which tried the king, he had recourse to the quibble, that his words ought to be taken in *mitiore sensu*, and that it should be presumed that perhaps he meant a judgment of acquittal! This is his argument: "My Lord, when judgment is demanded, is it not twofold, of acquittal

or condemnation? If those that then were intrusted with the power of judicature, if they did not know any law to proceed by to take away his Majesty, then I demanding their judgment, it doth not appear to be my judgment; and I refer it to the learned counsel, that counsel many times at the assizes and other courts have been sorry that the verdict has been given for their clients, when they have known the right lay on the other side, and so I might in this.”¹ And with reference to his acts being only those of an advocate, and therefore innocent, he said: “My Lord, I humbly answer this, to that which seems to be the most material part in the indictment, that we did assume a power; my Lords, I did not assume a power. I hope it will not be said that the counsel had any power: eloquentia in the counsel, judicium in the judges, and veritas in the witnesses, 25th of Acts, Tertullus, that eloquent orator, accused Paul; Paul answered for himself, and it is said, ‘Festus being willing to do the Jews a courtesy, he left Paul bound’; it was not the counsel that left him bound: his Majesty was never a prisoner to me, and I never laid my hands upon him; if any witnesses have spoken of any irreverence, I must appeal to God in that I did not in the least manner carry myself undutifully to his Majesty, though one of the witnesses was pleased to say that I said these words, ‘That there is a charge against the prisoner at the bar’; it was not

¹ 5 Howell State Trials, 1094.

said the 'prisoner at the bar'; there was not one disrespectful word from me. There is a case in the Third Institute of my Lord Coke: it is to this purpose, that one wilfully and knowingly forswore himself: the case was put to inveigle the court; and though the court does injustice upon a false oath, it is not injustice at all in the witness, it is perjury in him; if there can be no injustice in a witness, much less a counsellor can be said to have his hand in the death of any, because he has no power at all. This must needs follow, that if it shall be conceived to be treason for a counsellor to plead against his Majesty, then it will be felony to plead against any man that is condemned unjustly for felony. The counsellor is to make the best of his client's cause, then to leave it to the court."¹ And again, "I must leave it to your consciences, whether you believe that I had an hand in the king's death, when I did write but only that which others did dictate to me, and when I spoke only for my fee."²

Sir Orlando Bridgman, however, the Lord Chief Baron, in summing up the case to the jury, disposed of this ingenious defence by thus addressing the prisoner: "Counsel cannot be heard against the King: you undertake to be counsel against the King in his own person and in the highest crime; if the counsel at the bar in behalf of his client should speak treason, he went beyond his sphere; but you did not only speak (but acted) treason. You said

¹ 5 Howell State Trials, 1093.

² 5 Howell State Trials, 1098.

you used not disrespectful words to the King; truly, for that you hear what the witnesses have said: you pressed upon him; you called it a delay; you termed him not the king, but the prisoner at the bar, at every word. You say you did not assume an authority; it is an assumption of authority if you countenance or allow of their authority.”¹

Cook was found guilty, and when brought up for judgment he made a last desperate effort to get off by the same plea. Being asked what he had to say why the court should not pronounce judgment upon him to die, according to law, he urged two objections to the indictment, which were overruled, and he then said, “I say it was professionally.”

Lord Chief Baron: “That hath been overruled already; we have delivered our opinions; the profession of a lawyer will not excuse them or any of them from treason, and this hath been overruled, and is overruled again.”

So Cook suffered the death of a traitor, and was hanged.



AT the common law moderate chastisement of a servant might be justified; and to an action of assault, battery, and false imprisonment, it was a good plea “that the plaintiff, being a lunatic, the defendant arrested him, confined him, *and whipped him.*”²

¹ 5 Howell State Trials, 1110.

² Lord Campbell Lives of the Chancellors, Vol. VI. p. 39 note.

IN the case of *Norton v. Relly*,¹ a bill was filed by a maiden lady residing at Leeds, against a Methodist preacher and others, trustees named in a deed of gift executed by her to him, — suggesting that it had been obtained by undue means, — and praying that it might be delivered up to be cancelled. He had introduced himself to her notice by a letter, in which he said, that, “although unknown to her in the flesh, from the report he had of her he made bold to address her as a fellow-member of that consecrated body wherein the fulness of the Godhead dwelt, and that he was coming among them at Leeds, for a little time, to preach the kingdom of God,” subscribing himself “her affectionate brother in the flesh.” She was prevailed upon to invite him to her house, to accompany him to London, to give him large sums of ready money, and to grant him an annuity charged on her real estates in Yorkshire.

LORD CHANCELLOR HENLEY. — This cause, as it has been very truly observed, is the first of the kind that ever came before the court, and, I may add, before any court of judicature in this kingdom. Matters of religion are happily very rarely the subject of dispute in courts of law or equity. [After expressing his respect for dissenters, he proceeds:] But very wide is the difference between dissenters and fanatics, whose canting and whose doctrines have no other tendency than to plunge their deluded

¹ 2 Eden, 286.

votaries into the very abyss of bigotry, despair, and enthusiasm. And though even against those unhappy and false pastors I would not wish the spirit of persecution to go forth, yet are not these men to be discountenanced and discouraged whenever they are properly brought before courts of justice? — men who, in the Apostle's language, *go about and creep into people's dwellings, deluding weak women*, — men who go about and diffuse their rant and warm enthusiastic notions, to the destruction not only of the temporal concerns of many of the subjects of this realm, but to the endangering their eternal welfare. And shall it be said that this court cannot relieve against the glaring impositions of these men? that it cannot relieve the weak and unwary, especially when the impositions are exercised on those of the weaker sex? This court is the guardian and protector of the weak and helpless of every denomination, and the punisher of fraud and imposition in every degree. Here is a man, nobody knows who or what he is; his own counsel have taken much pains modestly to tell me what he is not, and depositions have been read to show that he is not a Methodist. What is that to me? But I could easily have told them what, by the proofs in this cause and his own letters, he appears to be, — a subtle sectary, who preys upon his deluded hearers, and robs them under the mask of religion. Shall it be said, in his excuse, that this lady was as great an enthusiast as himself? It is true that she

was far gone, — but not far enough for his purpose. Thus he addressed her, “*Your former pastor has, I hear, excommunicated you, but put yourself in my congregation, wherein dwells the fulness of God.*” How scandalous, how blasphemous, is this! In coming from London to Leeds he will not come in a stage-coach, but must have a post-chaise, and live elegantly on the road at the expense of the plaintiff, who gave him £50 in money, besides presents of liquor, so that his own hot imagination was further heated with the spirit of brandy. He secured a part of her fortune by lighting up in her breast the flame of enthusiasm, and undoubtedly he hoped in due time to secure the whole by kindling another flame of which the female breast is so susceptible; for the invariable style of his letters is “*all is to be completed by love and union.*” Let it not be told in the streets of London that this preaching sectary is only defending his just rights. I repeat, let not such men be persecuted, but many of them deserve to be represented in puppet-shows. I have considered this cause not merely as a private matter, but of public concernment and utility. Bigotry and enthusiasm have spread their baneful influence amongst us far and wide, and the unhappy objects of the contagion almost daily increase. Of this, not only Bedlam, but most of the private madhouses, are melancholy and striking proofs. Let it be decreed that the defendant execute a release to the plaintiff of this annuity, and

deliver up the deed for securing it. I cannot conclude without observing that one of his counsel, with some ingenuity, tried to shelter him under the denomination of "*an independent preacher.*" I have tried in this decree to spoil his "*independency.*"



LORD COKE, in the Fourth Institute, draws a parallel between a useful member of Parliament—one possessed of all "properties a parliament man should have"—and the Solomon of the bestial world, to wit, the elephant. "Every member of the House," he says, "being a counsellor, should have three properties of the elephant: first, that he hath no gall; secondly, that he is inflexible, and cannot bow; thirdly, that he is of a most ripe and perfect memory. . . . We will add two other properties of the elephant,—the one, that though they be *Maximæ virtutis et maximi intellectus*, of greatest strength and understanding, tamen gregatim semper incedunt, yet they are sociable, and go in companies. Sociable creatures that go in flocks or herds are not hurtful as deer, sheep etc., but beasts that walk solely or singularly, as bears, foxes etc., are dangerous and hurtful. The other, that the elephant is *Philanthropos*, homini erranti viam ostendit (a philanthropist, who showed the wanderer his road) and these properties ought every parliament man to have."

“**B**ROTHER of Winchester,” said Crammer to Lord Chancellor Gardiner, “you like not anything new, unless you be yourself the author thereof.” “Your Grace wrongeth me,” replied the inveterate Conservative. “I have never been author yet of any one new thing; for which I thank my God.”¹ “Such a conservatism,” says Sumner,² “is the bigotry of science, of literature, of jurisprudence, of religion, of politics. An example will exhibit its character.

“When Sir Samuel Romilly proposed to abolish the punishment of death for stealing a pocket-handkerchief, the Commons of England consulted certain officials of the law, who assured the House that such an innovation would endanger the whole criminal law of the realm. And when afterwards this illustrious reformer and model lawyer (for, of all men in the history of the English law, Romilly was most truly the model lawyer) proposed to abolish the obscene punishment for high treason, requiring the offender to be drawn and quartered, and his bowels to be thrown into his face, while his body yet palpitates with life,³

¹ Lord Campbell *Lives of the Lord Chancellors*, Vol. II. p. 181, 5th ed.

² *Works*, Vol. II. p. 127.

³ Lord Coke, in detailing this barbarous punishment, finds authority for each cruelty in the Bible. The “drawing” is justified by 1 Kings ii. 28; the “hanging” by Esther ii. 23. The “embowelling” is sanctioned by the circumstances attending the fate of Judas, Acts i. 18. For the extraction of the criminal’s heart, he finds authority in 2 Samuel xviii. 14, 15. The “beheading” he holds justified by 2 Samuel xx. 22. And he cites 2 Samuel iv. 11, 12, as authorizing the practice of hanging up the traitor’s disjointed body after execution. Psalm cix., in his opinion, sanctions the law of corruption of blood in such cases. 3 Inst. 211.

the Attorney-General of the day, in opposing this humane amendment, asked, ‘Are the safeguards, the ancient landmarks, the bulwarks, of the Constitution to be thus hastily removed?’ Which gave occasion for the appropriate exclamation in reply, ‘What! to throw the bowels of an offender into his face one of the safeguards of the British Constitution! I ought to confess that until this night I was wholly ignorant of this bulwark.’”



IN the Case of Swans,¹ it is held that cygnets belong equally to the owner of the male and the owner of the female swan; and this is the reason of the law: “The law thereof is founded on a reason in nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls, — for the cock swan holdeth himself to one female only, and for this cause nature has conferred on him a gift beyond all others; that is, to die so joyfully that he sings sweetly when he dies; upon which the poet saith:—

Dulcia defecta modulatur carmina lingua
Cantator, cygnus, funeris ipse sui etc.”



LORD LYNDDHURST was in his early days a *reporter*. His name, however, appeared only on one solitary blue cover of Taunton’s Reports.

“IF Acts of Parliament were, after the old fashion, penned by such only as knew what the common law was before the making of any Act of Parliament concerning that matter, as also how far forth former statutes had provided remedies for former mischiefs and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace by construction of law between insensible and disagreeing words, sentences, and provisos as they now do.¹”



WITH reference to the manner in which the Year-Books were reported, it is to be observed that the whole cause, as well the special pleadings as the debates of the law thereupon, were transacted or alleged at the bar; and the prothonotaries, ex-officio, afterwards made up the records in Latin. *And the court often condescended to discourse with the serjeants about the discretion of their pleas, and the consequences, with respect to their clients. And the court did all they could to prevent errors and oversights.*



COMPARE Elliott v. Stone, 12 Cush. 174, with Elliott v. Stone, 1 Gray, 571.

¹ Preface to 2 Rep. pp. ix, x.

ON a previous page¹ a case is stated from Croke's Reports in the time of Elizabeth. In Camden's "Remains,"² the sentence, and the performance of it, is given: "A poor man found a priest over-familiar with his wife, and because he spake it abroad, and could not prove it, his priest sued him before the Bishop's Official for defamation, where the poor man, in pain of cursing, was commanded, that in the parish church he should upon the Sunday, at high mass, stand up and say, 'Mouth, thou liest': whereupon, for fulfilling of his penance, up was the poor soul set in a pew, that the people might wonder at him and hear what he said; and there all aloud, when he had rehearsed what he had reported of the priest, then he set his hands on his mouth, and said, 'Mouth, thou liest': and by and by thereupon, he set his hands upon both his eyes, and said: 'But eyes,' quoth he, 'by the mass ye lie not a whit.'"



NELSON'S LUTWYCHE. We give two specimens of the style in which these valuable reports were edited.

"This is only a hearsay report, which the Sergeant had ex relatione of his brother Girdler, which, for aught I know, may be as good authority as Justice Warburton's old manuscript; only I must observe, that, if I tell a long and impertinent story what

¹ Ante, p. 12.

² Page 304, ed. 1870.

another man told me, it will not be allowed as evidence to a common jury, but it may serve to prolong the time, and so may this to enlarge the book."

"The Sergeant tells us, This case is reported by Sir J. Savile, and that the record was now printed to correct a mistake in that report, where 't is said there were two disturbances alleged etc. but certainly this could not be any reason for publishing this record, for after one hundred and fifteen years, when this case happened, it cannot be material to inform the world that there was but one disturbance set forth in that declaration; there must be some other reason for it, and probably it was to acquaint the reader (to use the common expression) how long the Lutwyches have followed the law; for I found John Lutwyche was attorney on the record for the defendants, and so he was in 9 Jac. Winch's Entries, fol. 9."



THE LORD STURTON AND LORD MORDANT.

THEY were brought to the bar now, being held for a contempt to the King for not coming to the Parliament by prorogation 5th November when the Gunpowder Treason was intended. And it was grandly suspected that they knew of the plot, because they were papists, and their excuses very frivolous. And Sturton was fined to six thousand marks, and Mordant to one thousand marks.¹

¹ Noy, 102.

IN 32 Eliz. Reginæ, "Jane" was agreed, by the Court of King's Bench, to be all one with "Joan."

In "Lib. Assis." 26, fol. 7, "Julian" and "Gilian" are made two distinct names; "I doubt not but upon some good ground," says Brooke.

"Some will have the name 'Mabel' to be a contraction of the Italians from Mabella, that is, My fair daughter, or maid. But whereas it is written in deeds Amabilia and Mabilia, I think it cometh from Amabilis, that is, Loveable, or Lovely, and that the names are the same."¹



THE defendant spoke these scandalous words of the plaintiff: "He hath got M. N. with child." Motion to arrest the judgment for this that these words are not actionable. But per Glyn Chief Justice: The words are actionable because it does not lie in the mouth of the defendant to say that the plaintiff and M. N. were husband and wife.²



SHOWER, after reporting a long argument of his own, says, "At which Dolbin Justice was angry, and said no man would have made such a motion but myself, and wondered that I should have made such a motion."³

¹ 2 Roll. Ab. 135.

³ Clerk v. Andrews, 1 Shower, p. 12.

² 2 Siderfin, 17.

“WHEN I was a *nisi prius* reporter,” says Lord Campbell, “I had a drawer marked ‘Bad Law’ into which I threw all the cases which seemed to me improperly ruled. I was flattered to hear Sir James Mansfield C. J. say, ‘Whoever reads Campbell’s Reports must be astonished to find how uniformly Lord Ellenborough’s decisions were right.’ My rejected cases, which I had kept as a curiosity,—not maliciously,—were all burnt in the great fire in the Temple when I was Attorney-General.”¹



IN October 1660, Chief Baron Bridgman presided at the trial of the regicides. We find handed down to us some of the flowers of his eloquence, in charging the grand jury on this occasion. Having explained to them that the treason consisted “in *imagining* and *compassing* the King’s death,” and stated that the prisoners had gone farther, and “*executed* him on a scaffold in front of his own palace,” he said: “Certainly this is so much beyond the imagination and compassing, as it is not only laying the cockatrice’s egg, but brooding upon it till it hath brought forth a serpent.” After stating that the crown of England is an imperial crown, he asks, “What is an imperial crown? It is that which, as to the coercive part, is subject to no man under God. The King of Poland has a crown; but what is it?”

¹ Lives of the Chancellors, Vol. V. p. 376 note, 5th ed.

At his coronation he is conditioned with the people, that if he shall not govern them according to such and such rules, they shall be freed from their homage and allegiance; but the crown of England is, and always was, an imperial crown, — not subject to any human tribunal or judicature whatever. As to the person of the King, he is not to be touched. Touch not mine anointed. It is true (blessed be God!) we have as great liberties as any people have in Christendom, but let us owe them where they are due; we have them by the concession of our Princes. Our Princes have granted them, and the King now grants them." Having stirred up their indignation by a rhetorical description of the King's death, he thus concludes: "No story that ever was — I do not think that any romance — any fabulous tragedy — can produce the like. You are now to inquire of blood — of royal blood — of sacred blood — blood like that of the saints under the altar, crying, *Quousque, Domine*. This blood cries for vengeance; and it will not be appeased without a bloody sacrifice. He that conceals the guilt of blood takes it upon himself, — wilfully, knowingly takes it upon himself; and we know that when the Jews said, Let his blood be on us and our seed, it continued and continues to bring a curse unto them and their posterity to this day."¹

We should think it rather strange if a judge were to tell the jury that a capital charge was so clearly

¹ 5 Howell State Trials, 989-991.

proved that they ought to find a verdict of *guilty* without leaving their seats; but even fair judges were not so squeamish in those days, and the case was made out in law, and, in fact, beyond all possibility of doubt. He checked the applause which burst out at the verdict, stating that it was more fitting for a stage play than a court of justice.¹



SWINBURNE mentions a bequest of a legacy to a person, on condition of his drinking up all the water in the sea; and it was held, that, as this condition could not be performed, it was void.² The condition to go to Rome in a day, which Blackstone mentions in his Commentaries as void, as impossible to be performed, may be good, since railroads are introduced on the Continent.



AN adulterer takes away another man's wife, and puts her in new clothes: the husband may take the wife with her clothes; for it is as it were a gift of the said apparel unto her. Besides, the more worthy thing draws to it things of less worthiness.³ Quære which is the more worthy,—the wife or the “new clothes”?

¹ 5 Howell State Trials, 1024, 1208. Lord Campbell Lives of the Chancellors, Vol. IV, pp. 112, 143, 5th ed.

² Part 4, sec. 6, art. 2.

³ Finch's Law, 22, 23.

ALL crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of that error if another particular ensue of as high a nature.

Therefore if an impoisoned apple be laid in a place to poison I. S., and I. D. cometh by chance and eateth it, this is murder in the principal that is actor; and yet the malice in individuo was not against I. D.

So if a thief find the door open, and come in the night and rob a house, and be taken with the manner, and break a door to escape, this is burglary; yet the breaking of the door was without any felonious intent; but it is one entire act.

So if a caliver be discharged with a murderous intent at I. S. and the piece break and strike into the eye of him that dischargeth it and killeth him, he is *felo de se*; and yet his intention was not to hurt himself, for *felonia de se* and murder are *crimina paris gradus*. For if a man persuade another to kill himself, and be present when he doth so, he is a murderer.

But when a man is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstance not pursued.

If a man command I. S. to rob I. D. on Shooters Hill, and he doth it on Gads Hill; or to rob him such

a day, and he doth it the next day; or to kill I. D. and he doth it not himself but procureth I. B. to do it; or to kill him by poison, and he doth it by violence; — in all these cases, notwithstanding the fact be not executed in circumstance, yet he is accessory nevertheless.

But if it be to kill I. S. and he killeth I. D., mistaking him for I. S., then the acts are distinct in substance, and he is not accessory.

And be it that the acts be of differing degrees, and yet of a kind; as if a man bid I. S. to pilfer away such a thing out of a house, and precisely restrain him to do it some time when he is gotten in without breaking of the house, and yet he breaketh the house; yet he is accessory to the burglary: for a man cannot condition with an unlawful act, but he must at his peril take heed how he putteth himself into another man's hands.

But if a man bid one rob I. S. as he goeth to Starbridge Fair, and he rob him in his house, the variance seemeth to be of substance, and he is not accessory.¹



BRACTON, describing the judges of his time, speaks the language likely to come from a disappointed practitioner: he calls them “*Incipientes et minus docti, qui cathedram judicandi ascendunt antequam leges dedicerint.*”

¹ Bacon Maxims, Reg. XV., XVI., citing Plowden, 474, 475.

IT is actionable to call a counsellor “a daffodown-dilly,” if there be an averment that the words signify an ambidexter;¹ or to say of an attorney, that “he hath no more law than Master Cheyny’s bull,” even although Master Cheyny actually have no bull; for if that be the case, as Keeling Chief Justice observed, “the scandal is the greater.”² And it is quite clear that to say that a lawyer has “no more law than a goose” is actionable; and the reporter adds a quære, whether it be not actionable to say a lawyer “hath no more law than the man in the moon”!³



A says to B, “One of us is perjured.” B. says to A, “It is not I.” And A. says, “I am sure it is not I.” B. shall have an action for these words, for the subsequent words show apparently that he intends him.⁴



SIR JOHN FINEUX, some time Chief Justice of the King’s Bench, was often heard to say, “Who-so taketh from a justice the order of his discretion, taketh surely from him more than half his office.”⁵

¹ 1 Roll. Ab. 55. pl. 17.

² 1 Siderfin, 327. 2 Keble, 202.

³ 1 Siderfin, 424.

⁴ *Coe v. Chambers*. 1 Roll. Ab. 75.

⁵ Camden’s “Remains,” p. 307, ed. 1870.

CUNNINGHAM writes of the "many reports which have been published," that "some of them, as Justice Shelley said, might be compared to Banbury cheeses, whose superfluities being pared away, there would not be enough left to bait what Lord Hale called 'the mousetrap of the law'; yet probably the meanest of them may, like the little birds, add something towards building the eagle's nest." ¹



IN the perusal of a very solid book on ecclesiastical law, including the progress of the ecclesiastical differences in Ireland, written by a native of that country, after a good deal of tedious and vexatious matter, the reader's complacency is restored by an artless statement how an eminent person "abandoned the errors of the Church of Rome, and adopted those of the Church of England."



"BUT particularly," says Sheppard, "if an idiot have so much knowledge that he can read or learn to read by instruction and information of others, or can measure an ell of cloth, or name the days of the week, or beget a child, son or daughter, or such like, whereby it may appear that he has some light of reason, then he is no idiot naturally." ²

¹ Cunningham, Preface, p. ix, A. D. 1766.

² Sheppard Gr. Ab. tit. Idiot.

IT is established that a subsequent will made under the impulse of a mistaken notion of a fact, and referring to the fact as having actually happened, and as being the foundation of the present testamentary act, will not revoke a former will;¹ according to the case, *Pater credens filium suum esse mortuum, alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est nulla.*²



IT was a question whether a rape could be committed on the body of a child of the age of six or seven years; and a person being indicted for the rape of a girl of seven years old, although he was found guilty, the court doubted whether a child of that age could be ravished; and it was said, if she had been nine years old she might, *for at that age she may be endowed.*³



THE only judicial opinion of Lord Fortescue which ever made a deep impression on the American side of the Atlantic is one involving the difficult question of domicile, and is thus reported:—

“A man’s bed stood so that he lodged in two parishes at once. The question was where his settlement should be. Mr. Justice Fortescue said, where his head lay; as being the more noble part.”

¹ *Campbell v. French*, 3 Ves. 321.

² *Cicero De Oratore*, lib. I. ch. 38, quoted in 1 Saund. 280 d, 6th ed.

³ *Dyer*, 394.

BOYDELL'S Illustrations of Shakespeare. This work was the subject of litigation in the celebrated case of *Boydell v. Drummmond*.¹ This is a leading case and familiar to the profession. To our non-professional readers, at least to those who own the volumes, a brief statement may be interesting. The Statute of Frauds enacts that no action shall be brought upon "any agreement that is not to be performed within the space of one year from the making thereof," unless there is some note or memorandum in writing, signed by the party to be charged. In this case the plaintiff proposed to publish a magnificent edition of Shakespeare, illustrated by seventy-two engravings, which were to come out in numbers, at three guineas per number, two of which were to be paid for in advance; each number was to contain four engravings; "*one number at least was to be published annually*, and the proprietors were confident that they should be able to produce two numbers *in the course of every year*." These proposals were printed in a *prospectus*, and lay in the plaintiff's shop. The plaintiff also kept a book, which had for its title, "Shakespeare subscribers, their signatures"; but did not refer to the *prospectus*. The defendant, determining to become a subscriber to the work, signed his name in the book containing the list of subscribers, but afterwards refused to take it; though he had received and paid for some few numbers, this action

¹ 11 East, 142, A. D. 1809.

was brought to compel him to complete his contract. The court decided that the agreement was not to be performed within the space of a year from the making thereof; that it was therefore within the Statute.



ROYAL proclamations were guarded, even from imitation, with great jealousy, by the Star-Chamber. In the twenty-second year of the reign of Henry VIII., a knight, happening to be an executor, caused *notice* to be published in several towns, that all persons to whom his testator was indebted, coming to him, should be paid. For this offence he was fined, and committed to the Fleet.



THE FIRST AMERICAN LAW REPORTS.

KIRBY'S REPORTS was published in 1789.¹ The Preface is not dated. The Preface to Hopkinson's Reports is dated February 1789. The volume is scarce. The full title is: "Judgements in the Admiralty of Pennsylvania, in Four Suits brought as for Maritime Hypothecations. Also, the Case of Silas Talbot against the Brigs Achilles, Patty, and Hibernia, and of the Owners of the Hibernia against their Captain, John Angus. With an Appendix containing the testimony exhibited in the Admiralty in those Causes. The Hon. Francis Hopkinson, Judge. Phila-

¹ See the Preface to the first volume of Connecticut Reports, p. xxviii.

delphia: Printed by T. Dobson and T. Lang in Second Street. MDCCCLXXXIX." 8vo. pp. 131."



IN Hale's Pleas of the Crown it is laid down that the *corpus delicti* must be expressly proved in criminal cases. In a recent crown case reserved,¹ it was argued, on the authority of this passage, that the *corpus delicti* must be proved in every criminal case, and that there was no difference in the application of the rule. But it was thus answered by that acute judge, Mr. Justice Maule: "If a man go into the London Docks sober without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or any wine was missed."



WILBUR *v.* HUBBARD.² This was an action brought to recover damages for the defendant's dog killing and wounding the plaintiff's sheep. By the court, Balcom P. J.: "The most material question in this case is whether the defendant's dog was one of the two that wounded and killed the plaintiff's sheep. The sheep were wounded and killed in the night of the 8th of August 1860; and

¹ Regina *v.* Burton, Dearsly C. C. 282.

² 35 Barb. 303.

there is some evidence that the defendant's dog was not at home that night, and that it was a 'sheep-killing dog.' Some of the witnesses said the defendant's dog had a 'very coarse voice'; that they could identify it by its bark, and heard the barking of a dog in the lot where the sheep were the night they were wounded and killed, which they thought was that of the defendant's dog. But none of them saw the dog that night in such lot. I think it possible for persons to identify a dog by merely hearing it bark, without seeing it. Some persons have such peculiar voices they can be identified by acquaintances who hear them talk, without seeing them; and it seems reasonable that some dogs may bark in such a manner and have such singular voices that they can be identified in the night time, by persons who know them well, by merely hearing them bark, without seeing them."



IN the reign of Charles II., Walcot was executed for the Rye House Plot; and twelve years after his execution a writ of error was brought, and his attainder reversed, because in the record of his sentence it had not been stated that his entrails should be burnt *while he was alive*.

A prisoner was convicted of a capital felony and was sentenced to be punished by transportation. On error the judgment was reversed because he was not sentenced to be hanged, and he was discharged.

FENN, who was a brewer, brought an action against Dixe for saying to some of his customers, "I will give my mare a peck of malt and lead her to the water, and let her drink, and she shall p—s as good beer as any as Tom Fenn brews." Rolle argued that the words are actionable; and he said that it had been adjudged here, that if one say of a brewer that he brews naughty beer, without more saying, these words are actionable, without any special damage alleged. But the whole court was against him (Croke only absent) that the words of themselves were not actionable, without any special damage alleged. And Berkeley said that the words are only comparative, and altogether impossible also. And he said that it had been adjudged that where one says of a lawyer, that he had as much law as a monkey, that the words were not actionable, because he hath as much law and more also. But if he had said that he hath no more law than a monkey, those words were actionable. And it was adjourned.¹



THE first misprision of treason created by the Succession Act passed in the reign of King Henry VIII. is made to consist in *words*, without writing, or exterior act or deed, whereby anything is published, divulged, or uttered to the peril of the King, slander or prejudice of the marriage with Anne

¹ March, pl. 93. 1 Roll. Ab. 58. Sir W. Jones, 444.

Boleyn, or the slander or disinherison of the royal issue. The clause on this subject affords an illustration how, by judicial interpretation, a minor offence may have its complexion darkened.

Two monks named Hale and Feron were convicted in the year 1535 of treason, on account of a *conversacion* which they were said to have had together, when walking "to and fro." The indictment alleged what Hale *said* to Feron. Nevertheless this "slander of the King's marriage" was only in *words*, and these were not made treason until a statute in the twenty-sixth year of the King. In order to remove this difficulty, it was alleged, in the indictment, that Hale *spoke* the words with a view of exciting Feron to *write* against the King, who subsequently wrote down in Latin the words which Hale had spoken in English. Here then, it was construed, there was a slander of the King's marriage in *writing*, and that *words* might interpretatively become *writings*, although in a different language, and according to another man's version.



AT one time there were at the bar of the Court of Chancery particular barristers who acquired reputation by their cunning in drawing bills. One of these being found *too subtle*, an order was made by Lord Keeper Egerton that no bills signed by him should be put upon the file.¹

¹ Cary, 38.

A CURIOUS case came before Lord Chancellor King showing that towards the middle of the last century the custom of marrying infants of tender years, which had formerly been very common, still prevailed in England. One of several guardians to an heiress took her from a boarding-school when she was only nine years old, and married her to his own son, who had no estate. The Lord Chancellor, on motion, ordered this guardian to bring into court the infant whom he had married to his son, and that he, the son, and the infant should attend. All attending, the counsel for the application pleaded, "that this guardian having, in so perfidious a manner, broken his trust, and married his ward to his own son, who was worth nothing, the Court of Chancery, the guardian of all infants with the superintendency and cognizance of all trusts, ought to commit him, and not suffer the girl, now but nine years old, to continue to cohabit with her husband, who ought not to be indulged with opportunities of inveigling her, and preventing her from disagreeing to the marriage when she should come to the age of twelve years, which it would be for her interest to do."

LORD CHANCELLOR. — The infant girl never having been under the care of the court, nor committed by the court to the care of this guardian, I do not think he can be considered guilty of a contempt of court; but then it is a very ill thing in him to marry this child to his own son, and he is punishable by an in-

formation. I will therefore have him bound over with sureties to appear to answer an information to be filed against him by the Attorney-General. As for the child, let her be handed over by this knavish guardian to the other guardian named in her father's will, who, it is to be hoped, will take proper care of her and do what is for her advantage in advising her to confirm or to renounce the marriage.¹



IN Rastell's Entries, 26, there is an amusing precedent of a declaration in an action on the case against a barber for shaving the beard "inartificially": 'R. S. nuper de N. attach. fuit ad respondendum H. B. de placito, quod cum idem R. ad barbam ipsius H. bene et artificialiter cum novacula munda et salubri radere apud N. assumpsisset, predictus R. barbam ipsius H. cum quadam novacula immundi et insalubri tam negligenter et inartificialiter rasisit, quod facies ipsius H. morbosa et scabiosa devenit ad damnum ipsius H. 40s. ut dicitur.'



KELLYNG reports a case in which the question was, whether a pardon for murder could be pleaded to a conviction for manslaughter. It was ultimately allowed.

¹ *Goodall v. Harris*, 2 P. Wms. 561.

SIR SAMUEL ROMILLY designates the Act of Elizabeth concerning Egyptians as "the most barbarous statute that ever disgraced our Criminal Code." It was enacted that "all persons above the age of fourteen years, that shall be found in the company of vagabonds commonly called or calling themselves Egyptians,¹ or counterfeiting or disguising themselves, by their apparel, speech, or behaviour, like them, although they are persons born within the king's dominions, if they continue one month, are felons and ousted of clergy." Sir Matthew Hale's only observation upon these statutes should be noticed: "I have not known these statutes *much* put in execution, *only* about twenty years since, at the Assizes at Bury, about thirteen were condemned and executed for this offence."²



LORD COKE has mentioned what he calls a "*flattering* preamble" of a Statute of Henry VII. every statement of which he endeavors to show was, to use his expression, *ex diametro* opposite to the enactments which it was made to preface. Such a preamble may be thought analogous to the metaphor applied by Butler to Sir Hudibras's courtship, of the sculler who looks one way and rows another.

¹ "That handkerchief
Did an *Egyptian* to my mother give." — *Othello*

² 1 Hale P. C. 670, 671.

SAUNDERS reports this case: "It was ruled by Hale Chief Justice, *cæteris tacentibus*, that a certain fault in a declaration was only matter of form and not matter of substance. Yet Saunders for the defendant urged that there were twenty books to prove it to be a matter of substance; which the Chief Justice confessed, but he said that the opinion had been otherwise for ten years past; *but I believe he meant his own opinion.*"¹



LORD COKE, in his Third Institute, observes of the Statutes of Apparel, that many of them "fight with and *cuff* one another." Lord Herbert remarks that these laws for the government of fashion themselves *changed fashion*. It was not till the reign of James I. that Englishmen obtained liberty of apparel.



IF a carrier, to whom a package of goods is delivered to take to a certain place, open the package and take out *part* of the goods, it is larceny; yet it is not larceny if he take away the *whole* package.² Chief Justice Kelyng says, "I marvel at the case put 13 Edw. IV. 96, that if a carrier have a tun of wine delivered to him to carry to such a place, and he

¹ *Slowe v. Wilmott*, 2 Saund. 402.

² *Commonwealth v. Brown*, 4 Mass. 580.

never carry it, but sell it all, this is no felony ; but if he draw part of it out, this is felony. I do not see why the disposing of the whole should not be felony also.”¹ It has been observed that this construction “*savors* of contradiction” and “stands more on positive law than sound reasoning.”



MRS. PEELE'S CASE.²

THIS was a suit against a certain Mrs. Peele, a sort of London Madame Le Brun of that day ; the representative, in the English capital, of this lady, whose Parisian name and fame are handed down to legal immortality in one of the great English Peerage Cases, and who has left the bad repute of “*la véritable* Maison Le Brun,” as Police Reports of 1860 assure us, to at least three hundred and twenty-eight houses of a special fame, sometimes called an ill one, in Paris, at this day. The Viscountess Purbecke,³ famous for her beauty, and who so abused the dangerous gift as to become the scandal of St. James's Court, was at this time the occupant of Somerset House, then as now a princely establishment, built originally by the

¹ Kelyng, 83.

² Littleton, 150, 242.

³ Her name was Frances Coke, and she was a daughter of Sir Edward of that name. Her mother was Lady Hatton—a Cecil—known in general history as a sister of Sir Thomas Burleigh, Earl of Essex, but better known to lawyers as the uncomfortable and imperious wife of the great Chief Justice, whose very name she refused to take, and whose life she tormented by every indignity that it was possible for a woman to offer to a husband.

Protector Somerset, long the abode of Queen Elizabeth, and, at the time we speak of, the resort of all that was "emancipated" in the world of courtly fashion. Like most beautiful women, however, while bringing troops of lovers daily to her feet, the Countess was herself the slave of one. This favored person was Sir Robert Howard, a younger son of the noble family of Suffolk. And, not too much to shock the *bienséances*, an arrangement was contrived to give the accepted lover what in France is known as *les petites entrées*, while the respectable world at large — including the lady's very virtuous, and, no doubt, very hopeful admirers — should enjoy in greater state and dignity *les grandes*. The virtuous Mrs. Peele was the common friend of Sir Robert and the lady; and, renting a handsome mansion next door to Somerset House, "a private passage," the reporter Littleton tells us, had been made between the two; so that, entering Mrs. Peele's street door, Sir Robert could find himself, without either scandal or difficulty, in the dressing-room of Lady Purbecke — and along with its less innocent attractions disclosing through the open lace-work of its half-drawn curtains and in its southern views the then sedgy banks of the Thames, the still lovely lawns of Lambeth, the ever-beauteous spires of Westminster, and the slope — in those days so graceful — of the Surrey Hills! Quid non vincit amor? How successfully it was all achieved! How delightfully they passed their time! Supping and

sinning so decorously, in all the charms of “love’s beginning.” But alas! the aliquid amari that springs up even in the fountain of our innocent delights! These very happy parties were not allowed to remain undisturbed; and notwithstanding the praiseworthy efforts they had made to avoid offending the over-good, Mrs. Peele was brought before the High Commissioners upon the discreditable charge of being “guilty of aiding, *causing*, and *procuring* adultery between the parties”; and, as it appears, from Littleton’s report, found GUILTY, and IMPRISONED.



THERE is one instance in the reign of Elizabeth of a criminal jurisdiction being directly assumed by the Court of Chancery on a bill filed to punish a party for corrupt perjury, where there was not sufficient evidence to convict him at common law. He demurred, but was compelled to answer.¹



TREMAIN’S CASE. Being an infant he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge. And the court sent a messenger to carry him from Oxford to Cambridge. And upon his returning to Oxford there went another, *tam* to carry him to Cambridge, *quam* to keep him there.²

¹ Cary, 90.

² 1 Strange, 167.

LORD COKE in the Third Institute relates that many and common women had seated themselves in a lane, next to the house of the friars Carmelites in Fleet Street: this being an open and known wickedness, King Edward III., to the end that these friars might perform their vows, one of which was to live in perpetual chastity, took order for the removing of these women.¹



THE following is the entire judgment of Mr. Justice Best in an important case: "If we were to grant this rule, we should make ourselves auditors to all the trading corporations in England."²



CHIEF JUSTICE KELYNG was unspeakably proud of the collar which he wore as Chief Justice, this alone distinguishing him externally from the puisnies, a class on whom he looked very haughtily. In his own report of the resolutions of the judges prior to the trial of Lord Morley for murder, before the House of Lords, he considers the following as the most important: "We did all, *una voce*, resolve that we were to attend at the trial in our scarlet robes, and the Chief Judges in their collars of S. S.,—

¹ 3 Inst. 205.

² *The King v. Bank of England*, 2 B. & Adl. p. 623. Quoted in *American Railway Frog Co. v. Haven*, 101 Mass. p. 407.

*which I did accordingly."*¹ His volume of decisions in criminal cases abounds with silly egotisms.



WE will conclude this volume with a single line from Lord Bacon:—

"Rather to excite your judgment briefly than to inform it tediously."²

¹ Kelyng, 53, 54. 6 Howell State Trials, 769.

² Articles of Union between England and Scotland.

THE END

ODDITIES OF THE LAW

BY

. FRANKLIN FISKE HEARD

ESQ.

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SAN FRANCISCO
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SIR THOMAS BROWNE.

SUNT bona, sunt quaedam mediocria, sunt mala plura
Quæ legis hic: aliter non fit, Avite, liber.

MARTIAL.



ODDITIES OF THE LAW.

IN the year 1598 Sir Edward Coke, then Attorney General, married the Lady Hatton, according to the Book of Common Prayer, but without banns or license, and in a private house. Several great men were there present, as Lord Burleigh, Lord Chancellor Egerton, etc. They all, by their proctor, submitted to the censure of the archbishop, who granted them an absolution from the excommunication which they had incurred. The act of absolution set forth that it was granted by reason of penitence, *and the act seeming to have been done through ignorance of the law.*¹

ACCORDING to Clayton, p. 158, the design of a bill of exceptions "is to prevent the preeipitancy of the judge."

¹ Middleton v. Croft, Cunningham, 103, 3d ed.

GODBOLT, p. 34, reports a case in which Chief Justice Belknap lays down a certain proposition which "he swore to be law."

— • • • —

IN Mosby v. Leeds, 3 Call, 439, "Leeds filed a bill in chancery, stating that Clark, being indebted to him, absconded, and the plaintiff took out an attachment against his effects, which was levied by Mosby, the sergeant of the city of Richmond, on a female slave and some other articles; that Marshall or Anderson, having a claim against Clark for house-rent, directed the sergeant on the succeeding day to distrain, who appears to have levied it on the balance of the negro which should remain after satisfying the plaintiff."

— • • —

MR. JUSTICE MAULE once said that nominal damages "are in effect only *a peg to hang costs on.*"¹

— • • —

"IN order to obtain an equitable verdict in an action of adultery," writes Voltaire, "the jury should be composed of twelve men and twelve women, with an hermaphrodite to give the casting-vote in the event of necessity."

¹ Beaumont v. Greathead, 2 D. & L. 635, 636.

IN the Third Institute, cap. I., is this maxim, *Injuria illata judici seu locum tenenti regis videtur ipsi regi illata, maxime si fiat, in exercente officium.*

Shakespeare, in the following passage from the Second Part of Henry IV. refers to this maxim, or to the law which it describes:—

CHIEF JUSTICE. I then did use the person of your father;
 The image of his power lay then in me ·
 And, in the administration of his law
 Whiles I was busy for the commonwealth,
 Your Highness pleased to forget my place,
 The majesty and power of law and justice,
 The image of the king whom I presented,
 And struck me in my very seat of judgment
 Whereon, as an offender to your father,
 I gave bold way to my authority,
 And did commit you.

ACT V. SC. 2.

In a very recent case in the House of Lords, Lord Selborne, in the course of the argument as to notice, referred to the case of Chief Justice Gascoigne, who without a moment's hesitation, and without any prior notification, sent the Prince of Wales instantly to the Fleet Prison for a contempt of court committed in *præsentia*; the heir of the crown submitting patiently to the sentence, and making reparation for his error by acknowledging it.¹

¹ *Walt v. Ligertwood*, L. R. 2 H. L., Scotch Appeals, 367 note, A. D. 1874.

FOR their private reading our readers are referred to the case of *Smith v. Tebbitt*, L. R. 1 P. & D. at pp. 405, 406.



IN *Price v. Sears*, 2 Lowell, 553, a claim of salvage for a boat on which the plaintiff escaped from a ship lost in mid-ocean is rather dryly disposed of: “As the boat appears to have saved him quite as much as he the boat, that account is in equilibrio.”



“THE case in *Salkeld* does not come very strongly recommended. For first, it is an anonymous case: and next, what is relied upon as there said was beside the point in judgment.”¹



SIR HARBOTTLE GRIMSTON wrote in true professional language of his father-in-law, Sir George Croke, that he was continued one of the judges of the King's Bench “till a certiorari came from the great Judge of heaven and earth to remove him from a human bench of law to a heavenly throne of glory.”²

¹ Per Lord Kenyon, C. J., in *Taylor v. Eastwood*, 1 East, 216.

² Cro. Eliz., Epistle Dedicatory.

“**Y**OU have made a long entry to a little house,” said Lord Keeper Egerton to Mr. Higgins, who used a long preface to a cause of little worth, and might have been sooner answered.¹



IN a recent volume of “Reports of Cases Argued and Determined in the Court of Appeals of the State of New York,” is this marginal note, and this only: “Judgment affirmed of course.”²



IN an action for scandalous words spoken of a justice of the peace, the Court observed: “There is not much difficulty in this case; but there is no end of citing and answering cases. The plaintiff here is said to be a justice, yet no special damage laid in the case: the office of justice of the peace is not so considerable but that many people choose to decline it.”³



IT is said in *March on Arbitraments*, 215, that a non-suit “is but like the blowing-out of a candle, which a man, at his own pleasure, lights again.”⁴

¹ *Notes and Queries*, 4th ser. vol. VII. p. 5.

² *Lyman v. Wilber*, 3 Keyes, 427.

³ *Palmer v. Edwards*, Cooke, 212, 3d ed.

⁴ Quoted by Metcalf, J., in *Clapp v. Thomas*, 5 Allen, 139.

IN a recent case Chief Justice Chapman observed that "Experience is not sufficiently uniform to raise a presumption that one who has the means of paying a debt will actually pay it."¹



MR. JUSTICE WAYNE, having occasion to refer to the second volume of Gray, cited it as follows: "the 2d of Horace Gray's Reports of the Supreme Judicial Federal Court of Massachusetts."²



"THE parents of trusts were *fraud and fear*, and a court of conscience was the *nurse*."³



SAUNDERS thus concludes the report of the case of Windsor v. Gover, 2 Saund. 305 *c*: "For this fault alone judgment was given against the defendant by Twisden, Raynsford, and Morton, Justices. Kelynge, Chief Justice, being absent, who said that the plea in this point was altogether insensible. But I believe their principal reason was *because they would not determine the matter of law*."

¹ Atwood v. Scott, 99 Mass. 178.

² Dynes v. Hoover, 20 How. 81.

³ Attorney General v. Sands, Hard. 491, quoted in 1 Perry on Trusts, § 3 note.

SIR FRANCIS PALGRAVE relates this anecdote: Within memory, at the trial of a cause at Merioneth, when the jury were asked to give their verdict, the foreman answered, "My lord, we do not know who is plaintiff, or who is defendant; but we find for whoever is Mr. C. D.'s man." Mr. C. D. had been the successful candidate at a recent election, and the jury belonged to his color.¹



LORD ELDON mentions a remarkable instance as regarded himself, of the uncertainty of evidence as to handwriting. A deed was produced at a trial, on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be by Lord Eldon himself; and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity, yet Lord Eldon had never attested a deed in his life.²



LORD COKE says that Moses was the first reporter of law.³

¹ Authority of the King's Council, p. 113.

² *Engleton v. Kingston*, 8 Ves. 473. Quoted by Mr. Justice Coleridge in his judgment in *Doe v. Suckermore*, 5 A. & E. 716, and 2 N. & P. 31.

³ 6 Rep. Pref. p. xv.

JUDGMENT was given against the defendant of about forty years of age, upon which judgment he brought a writ of error, and assigned infancy, and, appearing by attorney for error, the Court fined the attorney.¹



IN the Preface to the Eighth Part of his Reports Lord Coke says: "There are certain other cases now published by me, concerning some of the most abstruse, dark, and difficult points in the law, and yet very necessary to be known. And I have of purpose done these as plainly and clearly, and therewith as briefly, as I could. For the laws are not like to those things of nature which shine much brighter through crystal or amber than if they be beheld naked; nor like to pictures, that ever delight most when they are garnished and adorned with fresh and lively colors, and are much set out and graced by artificial shadows."



THE following is one of the head-notes to the case of *Abbe v. Rood*, 6 McLean, 107: "A witness who swears that a certain thing was said or done is entitled to greater weight than a witness who said that he did not hear the remark, or witness the act."

¹ Per Holt, C. J., in *Pierce v. Blake*, 2 Salk. 515, 516.

THE Public Local Laws of Maryland, vol. 2, p. 315, contains the Police Act of the City of Baltimore, passed in 1860. This provides that "No *Black Republican*, or indorser or approver of the *Helper Book*," shall be appointed to any office under the Board of Police. The constitutionality of this act came before the court in *Baltimore v. State*, 15 Md. 376, 468. The above clause was objected to as unconstitutional; but the Court held that they could not take judicial cognizance of the meaning of these words.



"IT is wonderful how slowly the most obvious truths are perceived and admitted. The plain and simple morality of the gospel required a revelation. Even in my day at the bar it was the constant practice of the Orphans' Courts to allow a charge, in administration accounts, for the price of strong drink furnished avowedly to stimulate the bidders at the sale of the decedent's effects."¹



ON the titlepage of Clayton's Reports is this motto: "Open thy mouth for the dumb. . . . Plead the cause of the poor and needy." — PROV. xxxi. 8, 9.

¹ Per Gibson, C. J., in *Pennock's Appeal*, 14 Penn. State, 450, A.D. 1850.

IF the husband will not supply his wife with necessaries, she must make her complaint to the ordinary, and he may supply a remedy; and that this is the proper course, and best adapted to such a complaint, is manifest. Because the bishop himself ought to examine the matter in private; and, if he finds all persuasion to a reconciliation useless, he must proceed to sentence, and this will be according to the demerit of the wife, and not according to the estate and degree of her husband, as a jury must proceed, which would be a pernicious precedent, since bad women would have as great provision as good women, when the default is on the part of the husband. But, in the spiritual court, such bad women as have violated their vows shall have such provision as clerks convict (Stamf. 140), *and shall be fed with the bread of affliction and the water of adversity.*¹

WHEN sitting in the Rolls Court, indignant at the conduct of one of the parties, Lord Kenyon astonished his staid and prosaical audience by exclaiming, "This is the last hair in the tail of procrastination!" Whether he plucked it out or not, observes Mr. Townsend, the reporter has omitted to inform us.²

¹ Manby v. Scott, 2 Smith L. C. 457, 458, 7th London ed.

² Lives of Eminent Judges, vol. 1, p. 79.

A STATUTE of New York provides, that if an officer in a corporation refused, on request of a stockholder, "to exhibit the books, or to submit them to an examination," he should forfeit a certain sum. The defendant contended that the stockholder could not take off a list of stockholders. "It was supposed," said the Court, "that the etymological meaning of the words 'exhibit' and 'examine' limited their meaning to the construction contended for by the defendant. If the derivation be from *examen*, a swarm of bees, it may be supposed to imply the industry and perseverance of the *bee*, and would then authorize a search as thorough as the most earnest could desire; and not only a search, but that the best part of that which is searched should be also carried off to be converted to a good and useful purpose."¹

IT was argued in a case in the House of Lords, that the word "but" is not necessarily in opposition to what precedes it. It is a conjunction as well as a preposition. In one case it is derived from "be out," and is equivalent to "except," or "without." Per Lord Brougham: "As in the motto of the Macphersons, 'Touch not a cat but [without] a glove.'"²

¹ Brouwer v. Cotheal, 10 Barb. 216.

² Abbott v. Middleton, 7 House of Lords Cases, 75, 76.

LORD CAMPBELL relates, that upon Bunyan's wife seeking redress from the Judges of Assize, who were the *furious* Twisden and Hale, the former, according to Bunyan's own account, "snapt her up." But Hale said, "Alas, poor woman!" and added, "There is no course for you but to apply to the king for a pardon, or to sue out a *writ of error*; and, the indictment or subsequent proceedings being shown to be contrary to law, the sentence shall be reversed, and your husband shall be set at liberty," — a piece of information little calculated to have extricated the *tinker* Bunyan from the "Slough of Despond." ¹



THE late Lord Justice James remarked, in a very recent case in the Court of Appeal, that the Court could not be too strict in taking care that the pleadings should not degenerate into the oppressive character of some of the pleadings in the old Court of Chancery. "We must not," added his lordship, "be driven to confess, as Oliver Cromwell did with a sigh, in reference to his ineffectual attempt to reform the law and procedure of this country, that the sons of Zeruiah are too hard for us. For my own part, I do not mean to succumb to their devices." ²

¹ Lives of the Chief Justices, II. 212 and note, 3d ed.

² *Davy v. Garrett*, 38 L. T. N. S. 81, A.D. 1878.

IN *Brocket v. Ohio Railroad Company*, 14 Penn. State, 244, 245, where the question was whether a railroad, under an authority to take land, could move a house, Gibson, C. J., said: "It is indispensable to safety and speed that the route of the railroad be as direct as the surface of the country will permit, but they could not be attained in a settled country if every hovel or house were privileged; and thus a quasi national work intended for posterity might be botched through a respect for the sacredness of temporary erections. The course of a railroad might be insuperably obstructed by the obstinacy of a proprietor in the gorge of a mountain, or the pass be made, at least, difficult and dangerous. A mangled passenger inquiring the reason of a deflection, when the cause of it had disappeared, might be told of our infinite respect for property at the expense of safety; but the information would neither ease his pain, nor set his leg."



"THE report of the case of *Swift v. Stevens*, 8 Conn. 439, concludes as follows: "Peters, J., having received, during the argument of this case, intelligence of the death of his son, Hugh Peters, Esq., of Cincinnati, left the court-house, — multa gemens, casuque animum concurrus, — and gave no opinion."

THE following is one of the head-notes to the case of *Barrow v. Richard*, 8 Paige, 351: "A very highly *colored* description of the noxious effects of coal-dust, in a sworn bill in chancery, although somewhat poetical, cannot be treated by the Court as a mere poetic fiction: but upon demurrer to the bill, such coal-dust will be considered as a real nuisance."

THE CHANCELLOR. "The allegation in the bill on this subject, though it is a little poetical, cannot be considered a mere poetic fiction, as it is sworn to by the complainant, and is admitted by the demurrer. He there states that large quantities of volatile and offensive dust and smut from the coal rise in the air, and are diffused by the wind into the premises of the neighboring inhabitants. And in spite of all their care, such coal dust and smut not only settles upon their walks and their grass plats, but also on their fragrant plants and flowers, 'beclouding the brightness and beauty which a beneficent Creator has given to make them pleasant to the eye, and cheering to the heart of man.' But what must be still more offensive to the ladies of the neighborhood, 'this filthy coal-dust settles upon their doorsteps, thresholds, and windows, and enters into their dwellings, and into their carpets, their cups, their kneading-troughs, their beds, their bosoms, and their lungs; discoloring their linen and their otherwise stain-

less raiment and robes of beauty and comfort, defacing their furniture, and blackening, besmearing, and injuring every object of utility, of beauty, and of taste.' Making all due allowance for the *coloring* which the pleader has given to this naturally *dark* picture, it is perfectly certain that this keeping of a coal-yard upon any of these lots is a business offensive to the neighboring inhabitants, according to the spirit and intent of these restrictive covenants."

IN the course of the argument in the case of *The Betsey*,¹ Marshall, C. J., observed, "No attempt has been made to distinguish this case from those of *The Vengeance*² and *The Sally*.³ Those cases have settled the law; and, unless this case can be distinguished from those, the Court does not think an argument necessary." C. Lee for the claimant: "I hope to show that this case is distinguishable from those, and to be permitted to argue at large the point of law, that this is not a case of admiralty jurisdiction. I argued the case of *The Vengeance*, and I know it was not so fully argued as it might have been; and some of the judges may recollect that it was a rather sudden decision." Mr. Justice Chase answered, "I recollect that the argument was no great thing; but the *Court* took time, and *considered the case well*."

¹ 4 Cranch, 446.² 3 Dallas, 297.³ 2 Cranch, 406.

“UPON the question of cruel treatment,” said the Court in a case in Indiana, which was a petition for a divorce, “we think the evidence was sufficient to justify the finding. Among other facts one witness swore that he ‘saw the wife come out of the back door of the husband’s house, and his foot was after her.’ The Court may have inferred from this that she was forcibly expelled from the house.”¹



A NEGOTIABLE note given for a gaming consideration is void in the hands of even an innocent holder for value. *Unger v. Boas*, 13 Penn. State, 601. “The argument here is,” said the Court, by Mr. Justice Burnside, “that commerce is to be encouraged, and therefore we ought to decide in favor of an innocent indorsee. I am well satisfied that we shall not send a vessel less to sea by taking from commerce the uncertain aid of faro-banks and other gaming-tables.”



IN New York it has been determined that the fact that inspectors of elections, and the clerks, are sworn upon Watts’s Psalms and Hymns, and not upon the Gospels, will not invalidate the election.¹

¹ *Sullivan v. Sullivan*, 34 Indiana, 371.

² *People v. Cook*, 14 Barb. 259, 299.

IN *Touchard v. Crow*, 20 Cal. 150, 163, which was a jury-waived case, the Court charged itself as a jury on questions of fact. On appeal, Field, C. J., thus disposes of this part of the case: "This action was tried by the Court without the intervention of a jury. Of course, in such cases, the Court not only performs its peculiar and appropriate duty of deciding the law, but also discharges the functions of a jury, and passes upon the facts. The counsel of the appellants impressed, as it would seem, with this dual character, requested the Court to charge itself as a jury, and handed in certain instructions for that purpose. The Court, thereupon, formally charged that part of itself which was thus supposed to be separated, and converted into a jury, commencing the charge with the usual address, 'Gentlemen of the jury,' and instructing that imaginary body, that, if they found certain facts, they should find for the plaintiff, and otherwise for the defendants, and that they were not concluded by the statements of the Court, but were at liberty to judge of the facts for themselves. The record does not inform us whether the jury thus addressed differed in their conclusions from those of the Court. These proceedings have about them so ludicrous an air, that we could not believe they were seriously taken, but for the gravity with which counsel on the argument referred to them."

MR. COMMISSIONER FANE, in his examination before a committee of the House of Lords, calls the citing of an unreported case pocket pistol law.¹

— • • • —

“THE next cast of a fisherman’s net ” has long been used as an illustration of a mere expectancy, not the subject of grant. In a late case in Massachusetts it was sought to substantiate such a sale, and the Court were obliged to adjudge that a man has no salable interest in halibut in the sea. There is a possibility, they say, the man may catch halibut ; but he has no actual or potential interest in the fish until he has caught them.²

— • • • —

MR. JUSTICE VENTRIS states that a man “ cannot have an estate put into him in spite of his teeth.”³

— • • • —

“OFTEN an entire failure of consideration in the receipt of what is mere moonshine is sufficient to rescind a contract.”⁴

¹ 1 Lindley on Partnership, 42.

² Low v. Pew, 108 Mass. 317. The other maxim (not of the law) is applicable: “ First catch your fish,” etc. Cited in 1 Jones on Mortgages, § 136.

³ Thomson v. Leach, 2 Vent. 206, quoted by Abbott, C. J., in Townson v. Tickell, 3 B. & A. 35.

⁴ Per Woodbury, J., in Warner v. Daniels, 1 W. & M. 110.

LORD ELDON once observed, "It is with great regret, if that expression may properly come from a judicial mouth, that I am compelled to say that this action cannot be maintained."¹



THE law, it is true, aids the vigilant, and not the slothful. It is possible, nevertheless, even in such a case, to rise too early.²



IN Perkins on Conveyancing, § 300, is this passage: "Now are we to speak of dower. And as unto that know, that, as Mr. Littleton hath well showed and set forth in his first book, there are five manner of dowers, which appear in this chapter of Dowers; and many and diverse good cases concerning dower are there put by my Lord Littleton. And also there are so many good and necessary cases concerning dower put upon the writs of dower, in 'Natura Brevium,' with the additions, that a man can hardly speak any thing more concerning dower beyond what is showed and said in the same book. *And yet, notwithstanding that, something shall, by the grace of God, be said here concerning dower.*"

¹ Campbell v. Stein, 6 Dow, 135, 136.

² Per Roosevelt, J., in Livingston v. Bank of New York, 26 Barb. 309.

IN a very recent case in Tennessee it was decided that a husband and father who has a policy of insurance on his life, payable to him, his executors, administrators, and assigns, may dispose of it by will.¹ In the judgment, Chancellor Cooper gives a humorous version of the case of *Hales v. Petit*, 1 Plowd. 253:—

“The very point made by the learned counsel was elaborately argued and considered three centuries ago in one of the celebrated causes of that day,—a cause rendered still more memorable by the fact that it is supposed to have been the occasion of one of the colloquies of the Shaksperian drama. Plowden’s Reports were popular when first published, having been four times reprinted during the last quarter of the sixteenth century. They have been commended by our ablest American commentator for their authenticity and accuracy, and as ‘exceedingly interesting and instructive by the evidence they afford of the extensive learning, sound doctrine, and logical skill of the ancient English bar.’² Better authority, therefore, we could not find.

“In *Hales v. Petit*, 1 Plowd. 253, Sir James Hales, one of the Justices of the Common Pleas, a son of an eminent Baron of the Exchequer, was

¹ *Williams v. Corson*, 2 Tenn. Chanc. 269, A.D. 1875.

² “Exquisite and elaborate Commentaries,” says Lord Coke. Pref. to 3 Rep. viii.

found by a coroner's jury to have wilfully gone into a river, and himself therein feloniously and voluntarily drowned.' Such an act was, in those days, if not 'rank burglary,' at least felony without benefit of clergy, and not only deprived the guilty party of Christian burial, but occasioned a forfeiture of his goods and chattels to the Crown. The suit was between an assignee claiming under the Crown, and the widow of the deceased, and raised the question whether a joint lease to Justice Hales and wife was forfeited to the Crown, or survived to the widow. The argument turned upon the nice point whether the felony of the husband was consummate in his lifetime, or only after his death.

"Two able sergeants sought, on behalf of the widow, to satisfy the Court that the felony was consummated after the death of the distinguished judge. The following is a specimen of the 'sound doctrine and logical skill' of these members of the ancient English bar. They insisted that the 'forfeiture shall only have relation to the time of the death, and the death precedes the forfeiture, for until the death is fully consummate he is not a *felo de se*; for if he had killed another, he should not have been a felon until the other had been dead. And for the same reason he cannot be a *felo de se* until the death of himself be fully had and consummate. For the death precedes the felony both

in the one case and in the other, and the death precedes the forfeiture. But, nevertheless, the forfeiture comes at the same instant that he dies. Yet in things of an instant there is priority of time in consideration of law, and the one shall be said to precede the other, although both shall be said to happen at one instant; for every instant contains the end of one time and the commencement of the other. And, accordingly, here the death and the forfeiture shall come together and at one same time, yet there is a priority; that is, the end of the life makes the commencement of the forfeiture, though, at the same time, the forfeiture is so near to the death, that there is no meantime between them, yet, notwithstanding that, in consideration of law, the one precedes the other, but by no means has the forfeiture relation to any time in his life.'

“ It required four learned sergeants, on behalf of the assignee of the Crown, to meet this lucid argument. They insisted that the forfeiture should have relation to the act done in the lifetime which was the cause of the death. And one of them said, ‘ The act consists of three parts. The first is the imagination, which is a reflection or meditation of the mind, whether or no it is convenient for him to destroy himself, and what way it can be done. The second is the resolution, which is a determination of the mind to destroy himself, and to do it in this

or that particular way. The third is the perfection, which is the execution of what the mind has resolved to do. And this perfection consists of two parts, viz., the beginning and the end. The beginning is the doing of the act which causes the death, and the end is the death, which is only a sequel to the act.' And much more to the same purport.

"The reasoning of the Court is in the same learned and discriminating vein. For the Lord Dyer said: 'That five things are to be considered in this case. First, the quality of the offence; secondly, to whom the offence is committed; thirdly, what shall be forfeit; fourthly, from what time the forfeiture shall commence; and fifthly, if the term here shall be taken from the wife.' And Sir Anthony Brown, J., said: 'Sir James Hales was dead; and how came he to his death? It may be answered, By drowning. And who drowned him? Sir James Hales. And when did he drown him? In his lifetime. So that Sir James Hales, being alive, caused Sir James Hales to die, and the act of the living man was the death of the dead man.'

"The decision was in favor of the assignee of the Crown, and upon the ground that the act of the living man was the effective cause of the felony, although the latter was only consummate upon the death. It is an authority directly in point on the question before us, and binding as a precedent,

whatever may be said of the peculiar form in which its logic is presented.

“The Elizabethan drama is full of legal allusions, showing that the business of the courts was brought home to the people in those days, even more than in our era. What wonder, then, that the great dramatist, in his marvellous range of vision, should see this specimen of legal acumen, and serve it up for the amusement of the groundlings, and as a foil to the tragic end of the gentle Ophelia!

“In Sir James Hales’s case the coroner sat on him, and found it felony. In Ophelia’s case the ‘crowner’ sat on her, and found it Christian burial. In the first case the learned counsel says that the act consists of three parts,—the imagination, the resolution, and the perfection. ‘If I drown myself wittingly,’ says the clown, ‘it argues an act; and an act hath three branches: it is to act, to do, and to perform.’ The learned Court discusses its case upon the supposition that the man went to the water. The clown concedes that, ‘if the man go to the water, and drown himself, it is, will he, nill he, he goes. But,’ he adds, ‘if the water come to him, he drowns not himself: argal, he that is not guilty of his own death shortens not his own life.’ ‘But is this law?’ queries his fellow clown. ‘Ay, marry is’t; Crowner’s Quest Law.”

IN a case¹ where the decree was made thirty-eight years after the commission of the waste, Shadwell, Vice Chancellor of England, thus describes the principle upon which a wrongdoer is not protected by time: "That the author of a mischief is not to complain of the result of it . . . is a proposition supported by the Holy Scriptures and by the decisions of our own courts of equity;" and he further quotes St. Matthew's Gospel, xxvi. 52. and Ovid.²



THROUGHOUT the report of the case of *Conustable v. Clowbury*, Noy, 75, the word "ship" should be substituted for "wife." In the notes originally taken by Noy, the word would probably be "nief," which might be rendered either "ship," or the "*wife* of a villein."³



THE reader is referred to the charge to the jury in the case of *State v. Brown*, 67 N. C. 442. in which a negro was charged with having committed rape on the body of a white woman. It is too long for quotation.

¹ *Leeds v. Amherst*, 2 Phillips, 117; 20 Beav. 239; 14 Sim. 357, cited in *Banning on Limitations*, 99.

² *Neque enim lex æquior ulla est,*

Quam necis artifices arte perire sua. — *Ars Amat.* I. v. 655.

³ 2 M. & G. 48 note.

THE following eulogy on the common law is taken from the opinion in the case of *Snowden v. Warder*, 3 Rawle, 103, 104:—

“The common law is truly entitled to our highest veneration; and although it has been said by some to have been instituted by Brutus, the grandson of Æneas, and the first King of England, who died when Samuel was judge of Israel, and who wrote a book in the Greek tongue, which he called ‘The Laws of the Britons,’ and which he had collected from the laws of the Trojans, it is nevertheless not entitled to our veneration on account of its antiquity; for nearly all that is valuable in it is comparatively of modern date.¹ Neither is it entitled to our respect on account of the ancient, absurd, and superstitious modes of trial, none of which have the slightest resemblance to our present trial by jury. Still less does it deserve our admiration on account of the feudal system, which imposed a restraint upon every effort to improve the jurisprudence of the country, and which prevented the adoption of those maxims of justice and equity which now render it the admiration of the enlightened jurist, and the favorite of the people. It is, however, entitled to our veneration, because it has, within the last two centuries, been moulded by the wisdom of the ablest statesmen, and a succession of learned and

¹ See Preface to 3d Rep.

liberal-minded judges, into a flexible system, expanding and contracting its provisions, so as to correspond to the changes that are continually taking place in society by the progress of luxury and refinement. As the youthful skin of a vigorous child expands with its growth, and accommodates itself to every development which the body, in its progress to maturity, makes of its powers, capacities, and energies, so does the common law, in order to suit the exigencies of society, possess the power of altering, amending, and regenerating itself. It has been truly and eloquently said, that ‘it is the law of a free people, and has freedom for its end; and under it we live both free and happy. When we go forth, it walks silently and unobtrusively by our side, covering us with its invisible shield from violence and wrong. Beneath our own roof, or by our own fireside, it makes our home our castle. All ages, sexes, and conditions share in its protecting influence. It shadows with its wings the infant’s cradle, and with its arm upholds the tottering steps of age.’ It is the duty of the judiciary not only to guard it with vigilance against incongruous innovations, but also to extend the operation of its principles, so as to embrace all the new and various interests which arise among an active and enterprising people. Thus much for the common law.”

THE language of the Court on the trial of questions of legitimacy, as reported in the Year Books, was sometimes more emphatic than decorous. Judge Richell improved upon the maxim of civil law in favor of legitimacy by making it of still more general application. He says, "For who that bulleth my cow, the calf is mine."¹ Perhaps Shakespeare intended to immortalize Judge Richell and his learned brethren, by making them the prompters of King John, in the following address to Robert Falconbridge:—

KING JOHN. Sirrah, your brother is legitimate;

Your father's wife did after wedlock bear him:

And, if she did play false, the fault was hers;

Which fault lies on the hazards of all husbands

That marry wives. Tell me, how if my brother,

Who, as you say, took pains to get this son,

Had of your father claim'd this son for his?

In sooth, good friend, your father might have kept

This calf, bred from his cow, from all the world;

In sooth, he might: then, if he were my brother's,

My brother might not claim him; nor your father,

Being none of his, refuse him. This concludes,—

My mother's son did get your father's heir;

Your father's heir must have your father's land.

ACT I. SC. 1.



“THAT excellent code which has grown gray
by *the awful hoar of innumerable ages.*”²

¹ Year Book, 7 Hen. IV. 9, 13. Barony of Gardner, lv. note.

² Hall Admiralty, 91.

TO the case of *Moore v. Moore*, 2 Atk. 273, which arose upon some differences and disputes between husband and wife, the reporter appended the famous “*Nota Bene*: ‘Mr. Attorney General,¹ after the decree was pronounced, said, this was so uncommon a case that probably it would never happen again. The Lord Chancellor² replied, If you think so, you must have a very good opinion of the ladies, for

In amore hæc omnia insunt vitia: injuriæ,
Suspiciones, inimiciæ, induciæ,
Bellum, pax rursus.’ ”³



“WE do not impeach the omnipotence of the Legislature for creating attorneys, as the world was created, out of nothing: or the power to control such eccentric orbs within their appropriate spheres. Our province is rather to ascertain their orbits, and to harmonize their motions, if possible, with the movements of other bodies.”⁴



DECLARATION in *Murphy v. Staton*, 3 Munf. 239, “for negligently *ducking*” certain goods.

¹ Sir Dudley Ryder.

² Lord Hardwicke.

³ Terence, *Eunuchus*, Act i. sc. 1, near the commencement.

⁴ Per Cutting, J., in *Simmons v. Jacobs*, 52 Maine, 156.

IN a recent case in Indiana, the Chief Justice thus discourses :¹ “Immediately after the fall of Adam there seems to have sprung up in his mind an idea that there was such a thing as decency and such a thing as indecency ; that there was a distinction between them ; and since that time the ideas of decency and indecency have been instinctive in, and indeed parts of, humanity. And it historically appears that the first most palpable piece of indecency in a human being was the public exposure of his or her, as now commonly called, privates ; and the first exercise of mechanical ingenuity was in the manufacture of fig-leaf aprons by Adam and Eve, by which to conceal from the public gaze of each other their now, but not then, called privates. This example of covering their privates has been imitated by all mankind since that time, except, perhaps, by some of the lowest grades of savages. Modesty has ever existed as one of the most estimable and admirable of human virtues.”



HASTELOW v. JACKSON, 8 B. & C. 221. “I accede to the authority of that case, although I think it a very strong decision. It does not convince me : *it overcomes me.*” Per Alderson, B. in Mearing v. Hellings, 14 M. & W. 711, 712.

¹ Ardery v. State, 56 Ind. 328, 329, A.D. 1877.

THE late Lord Justice James observed in a recent case, "It appears to me that the proper place for such an argument as this would be in some satirical work ridiculing, by clever exaggeration the doctrines of the Court of Equity with respect to constructive notice. It is not, to my mind, a substantial argument, capable of being addressed with any effect to any court whatever."¹



SIR James Stephen says, "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."²



"RICH v. BASTERFIELD, 4 C. B. 783, is the only case at all in your favor, and I think that is a *desperate refinement*." Per Blackburn, J., in Harris v. James, 45 L. J. Q. B. 546; 35 L. T. 241.



"AN accident is something which may be present or absent, without detriment to the subject."³

¹ Hunter v. Walters, 7 Ch. App. 86.

² General View of the Criminal Law of England, p. 99.

³ Cited by Chief Justice Metingham, through a Latin translation, from Porphyrius, Year Book, 21 & 22 Edward I. 72.

NON temere credere est nervus sapientiæ.
Not to believe rashly is the nerve of wisdom.¹



IF a pauper be nonsuited, the usual practice is to tax the costs, and for non-payment to order him to be whipped.² Salkeld reports: "I moved that a pauper might be whipped for non-payment of costs upon a nonsuit, and the motion was denied by Holt, C. J., saying he 'had no officer for that purpose, and never knew it done.'"³



"ALBEIT he that hath accomplished the age of fourteen years at the time of the marriage be not then able to pay the debt which he oweth to his wife, yet by the received opinion (though some dissent), the matrimony is not therefore by and by to be adjudged void; but she is to expect until he have overreached the eighteenth year of his age, wherein plena pubertas is concluded; and if then, also, he be unable to pay his dues, at the instance of the woman the marriage may be dissolved, unless the judge, upon the consideration of the qualities of the persons, shall grant a longer time."⁴

¹ Wade's Case, 5 Rep. 114 b.

² 2 Salk. 506.

³ Bac. Ab. Pauper D.

⁴ Swinbourne on Spousals, 49.

THE chronicler relates that Alan de Neville, chief forester of Henry the Second, pleased the king during his (Alan's) lifetime, but that upon his death, when the brethren of a certain monastery sought a portion of his substance for their house, the king showed his regard for his late forester by replying, "I shall have his wealth; but you may have his carcass, and the devil may have his soul."¹



A CURIOUS instance of the plea *molliter manus imposuit* occurs in a case reported in Levinz.² The plea to an action for assault and battery was that the female defendant, being the wife of an esquire and justice of the peace, the female plaintiff being the wife of a doctor in divinity, assumed to go before her at a funeral at Plymouth, whereupon the defendant gently laid her hands upon to displace her, as she lawfully might. The Court, without deciding the question of precedence, gave judgment for the plaintiff.



SIMON filius Petri, Baron of the Exchequer, anno XI. Hen. II.³

¹ Bigelow, *History of Procedure in England*, 146, note.

² *Ashton v. Jennings*, 2 Lev. 123.

³ 2 Madox *Hist. Exch.* 313.

IT was decided, in the Duchess of Kingston's case, that a judgment which had been obtained by fraud would not stand in the way of a prosecution of the duchess for bigamy; that the suit in the Ecclesiastical Court was a contrivance merely, a link in the chain of fraud, and in truth no judgment. According to the phrase used by Lord Loughborough, *Fabula, non iudicium, hoc est: in seenâ, non in foro, res agitur.*¹



“STANDS in his shoes.” “An expressive phrase.”²



HENRY HUNT, the famous demagogue, having been brought up to receive sentence upon a conviction for holding a seditious meeting, began his address in mitigation of punishment by complaining of certain persons who had accused him of “stirring up the people by *dangerous eloquence*.” Lord Ellenborough, C. J. (in a very mild tone): “My impartiality as a judge calls upon me to say, sir, that, in accusing you of that, they do you great injustice.”³

¹ Lord Cranworth, in *Shedden v. Patrick*, 1 Macqueen, 608, citing Wedderburn, S. G., in *The Duchess of Kingston's Case*, 20 Howell State Trials, 479.

² Per Hosmer, C. J., in *Enos v. Tuttle*, 3 Conn. 250.

³ Lord Campbell, *Lives of the Chief Justices*, IV. 300, 3d ed.

IN Massachusetts, in a very recent case, the Court say: "The question, which has been so ably and exhaustively argued by the counsel on each side, is one which cannot properly arise in this case."¹



BOLINGBROKE, after his partial pardon and return to England, being suspected of harboring a person accused of a state crime, his house, and even his bed-chamber, as he was lying in his bed, were searched by the ministers of justice. Traitorous bed-fellow with him he had none; a bed-fellow, however, he had, a female, whose reputation would have been ruined by the disclosure. Confusion more or less he could not but have betrayed. Had the search ended there, this confusion would naturally and properly have been regarded as circumstantial evidence of the crime he was suspected of. His presence of mind saved him from that mischance. Uncovering enough of her person to indicate the sex without betraying the individual, he preserved himself as well from the imputation of the crime of which he was not guilty as from the collateral misfortune which that imputation was so near bringing on his head.²

¹ *Attleborough National Bank v. Rogers*, 125 Mass. 343.

² 3 *Bentham Ev.* 151 note.

IN regard to professional communications, the reason of public policy which excludes them applies solely to those between a client and his legal adviser: and the rule is clear and well settled that the confidential counsellor, solicitor, or attorney of the party, cannot be compelled to disclose papers delivered, or communications made to him, or letters or entries made by him, in that capacity.¹

The rigid enforcement of this rule no doubt operates occasionally to the exclusion of truth: but if any one feels inclined to condemn the rule on this ground, he will do well to reflect on the eloquent language of the late Lord Justice Knight Bruce, who, while discussing this subject on one occasion, felicitously observed, "Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."²

¹ 1 Greenl. Ev. § 237.

² *Pearse v. Pearse*, 1 De Gex & Smale, 28, 29

IT was finely remarked by Roger North, that “Generally, in the law as well as in all other human literature, antiquity is the foundation; for he that knows the elder can distinguish what is new, but he that deals only in the new cannot tell how fresh or stale his opinions are, nor from whence they are derived.”¹ But it is of equal importance, that, knowing the new, he should be able to distinguish the elder. It is, indeed, the advice of Lord Coke, that after the student “is enabled and armed to set on our Year Books, let him read first the later reports, for two causes: First, for that for the most part the latter judgments and resolutions are the surest, and therefore it is the best to season him with them in the beginning, both for the settling of his judgment and for the retaining of them in memory: secondly, for that the latter are more facile, and easier to be understood, than the more ancient; but, after the reading of them, then to read these others before mentioned, and all the ancient authors that have written of our law, for I would wish our student to be a complete lawyer.”²



IT is a beautiful expression of Lord Bacon's, that “he that robs in darkness breaks God's lock.”

¹ Discourse on the Study of the Laws, p. 16, ed. 1824.

² Co. Litt. 249 b. 4 Kent Comm. 479.

THE rule that ignorance of the law shall not excuse a man, or relieve him from the penal consequences of a crime, is sometimes spoken of as arising from a presumption that every person knows the law. Mr. Justice Maule once observed that "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so." *Martindale v. Falkner*, 2 C. B. 720. This language was characterized by Mr. Justice Blackburn as clear, and common sense. *Regina v. Tewksbury*, L. R. 3 Q. B. 629; 37 L. J. Q. B. 288. No principle is better established than that ignorance of the law is no excuse for its violation. On the other hand, there is a class of cases in which the ignorance of facts is held to be a complete defence.¹



IN *The Protector v. Geering*, Hardres, 99, Atkins says, arguendo, "Errors are like felons and traitors; *any* man may discover them; they do caput gerere lupinum."



IN *Brown v. Littin*, 1 P. Wms. 140, Lord Keeper Harcourt said, "that, this being an island, all imaginable encouragement ought to be given to trade."

¹ Heard Crim. Pl. 152.

LORD BACON, in his advice to Mr. Justice Hutton, says, "You should be a light to jurors to open their eyes, but not a guide to lead them by their noses."



TESTATORS should be prevented, if possible, "from sinning in their graves." This expression, which has become one of the current by-phrases always used in courts of equity on the fitting occasion, fell from Sir John Strange, in *Thomas v. Brittnell*, 2 Ves. Sen. 314.



"HEARSAY is no evidence; but it may be admitted in corroboration of a witness's testimony."¹



SIR BARTHOLOMEW SHOWER'S mode of treating Monmouth's invasion is excellent for its brevity. "Memorandum. In Trinity Term, Monmouth's rebellion in the West prevented much business. In the vacation following, by reason of that rebellion, there was no assizes held in the western circuit; but afterwards five judges went as commissioners of oyer and terminer and gaol-delivery, and *three hundred and fifty-one of the rebels were executed,*" etc.²

¹ Gilb. Ev. 890.

² 2 Show. 434.

SIR FREDERICK THESIGER, afterwards Lord Chelmsford, being engaged in the conduct of a case, objected to the irregularity of a learned sergeant who repeatedly put leading questions in examining his witnesses. "I have a right," maintained the sergeant doggedly, "to deal with my witnesses as I please." — "To that I offer no objection," retorted Sir Frederick; "You may deal as you like; but you shan't lead."

—♦—

"THIS is a very impartial country for justice," said Sam. "There ain't a magistrate going as don't commit hisself twice as often as he commits other people." — *Pickwick*.

—♦—

IN the famous Burgess's Anchovy Case the two sons of the inventor were the litigants. The brother who succeeded to the business complained that the other was nevertheless vending "Burgess's Sauce." Sir J. Knight Bruce, the Vice Chancellor, began to sum up as follows: "All the Queen's subjects are entitled to manufacture pickles and sauces, and not the less so that their fathers have done it before them. All the Queen's subjects are entitled to use their own names, and not the less so that their fathers have done it before them."

WHEN Thelwall was on his trial for high treason, he wrote the following note during the evidence for the prosecution, and sent it over to Erskine, his counsel: "I am determined to plead my cause myself." Erskine wrote under it, "If you do, you'll be hanged;" to which Thelwall replied, "Then I'll be hanged if I *do*."



LORD THURLOW, while at the bar, met a barrister one morning who accosted him with, "Oh! I am told that the barmaid at Nando's has a little baby." — "What the d—l is that to *me*?" — "But," pursued the barrister, "I hear the child is yours." — "Then what the d—l is that to *you*?"



WHEN Plunket was driven to resign the Irish Chancellorship, he was succeeded by Lord Campbell. The day of the latter's arrival was very stormy, and a friend remarked to Plunket how sick of his promotion the passage must have made the new-comer. "Yes," he replied ruefully; "but it won't make him throw up the seals."



LORD BROUGHAM defined a lawyer as "a legal gentleman who rescues your estate from your enemies, and keeps it himself."

IN manslaughter, according to the old authorities, there can be no accessories before the fact, for the offence is sudden and unpremeditated; and therefore, if A be indicted for murder, and B as accessory, if the jury find A guilty of manslaughter, they must acquit B. But the doctrine on the subject has been very differently adjudicated in recent cases, and must be limited to those cases where the act which causes the death is sudden and unpremeditated.¹ Thus, a man may be such an accessory by procuring poison for a pregnant woman to take in order to procure abortion, and which she takes, and thereby causes her death. *Regina v. Gaylor*, Dearsly & Bell C. C. 288: 7 Cox C. C. 253. During the argument in this case, Bramwell, B., said, "Suppose a man, for mischief, gives another

¹ To support an indictment for being accessory before the fact to manslaughter, as well as to other felonies, there must be an *active* proceeding on the part of the defendant: he must procure, incite, or in some other way encourage, the act of the principal. Therefore, where the defendant acted as stakeholder on the occasion of a prize fight which ended in the death of one of the fighters, but took no other part in the circumstances attending the fight, at which he was not present, than to hold the stakes, and hand them over afterwards to the winner, it was held that he could not be convicted as accessory before the fact to the manslaughter. During the argument Mr. Justice Mellor asked, "Can there be an accessory before the fact to a manslaughter of this kind, which is not in any way contemplated beforehand, but which occurs accidentally?" And the Court, without settling the question, quashed the conviction. *Regina v. Taylor*, L. R. 2 C. C. 147.

a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, another had counselled him to do it, would not he who counselled be an accessory before the fact?"

"The case of *Regina v. Gaylor*," said Mr. Justice Lord in a very recent case,¹ "is a peculiar one; and it is interesting, not for the principles of law which were or might be supposed to be settled by it, for the Court took time for advisement, and subsequently, as the report says, 'affirmed the conviction, but without giving their reasons for so doing;' but it is interesting rather by reason of the discussion between the judges and the counsel during the argument. Gaylor's wife had produced her own death by voluntarily taking a drug for the purpose, as she supposed, of procuring an abortion upon herself, though in fact she was not pregnant. The prisoner was indicted, not as an accessory before the fact to her murder, but for the substantive offence of manslaughter; and counsel and Court both indulged in interesting and acute queries as to the nature of the offences, both that committed by the wife and that by the husband; and various speculations as to the nature of the offence were suggested. The grounds suggested by the prisoner's counsel, upon

¹ *Commonwealth v. Chiovaro*, 129 Mass. 491, A.D. 1880.

which the Court should hold that the facts in the case did not constitute the crime of manslaughter were, that the prisoner's wife, in wilfully committing an unlawful act which might cause her death, and which, in fact, did cause her death, was a *felo de se*, and therefore guilty of the crime of murder; and also that the facts proved against the defendant showed him to be merely an accessory to the crime, and as in law there could be no such offence as an accessory before the fact in manslaughter, no offence was charged. It was evidently a case of novel impression, and although one or more of the judges were in doubt whether the doctrine, as laid down by Lord Hale, that there can be no accessory to manslaughter, might not admit of some qualification, under peculiar circumstances, we know only that the prisoner was held guilty of manslaughter, without knowing any of the grounds upon which the decision was based; and the last remark of Pollock, C. B., was, 'You have not satisfied me, that, as far as the woman is concerned, she has been guilty of any offence at all.' The interruptions of judges in the course of an argument are not adjudications."

This last remark is true, still, the discussions between the bench and the bar during an argument are not only entertaining and instructive, but the *ratio decidendi* is clearly brought out:

indeed, in most cases, these discussions are so exhaustive, that there is seldom any judgment pronounced at length. The entry is simply "conviction affirmed," or "conviction quashed," as the case may be.

—♦—

THERE is a curious case in Fortescue's Reports, relating to the privilege of peers, in which the bailiff who arrested a lord was forced by the Court to kneel down and ask his pardon, though he alleged that he had acted by mistake, for that his lordship had a dirty shirt, a worn-out suit of clothes, and only sixpence in his pocket, so that he could not believe he was a peer, and arrested him through inadvertence.¹

—♦—

SERGEANT K. having made two or three mistakes while conducting a cause, petulantly exclaimed, "I seem to be inoculated with dulness to-day." — "Inoculated, brother?" said Erskine, "I thought you had it in the natural way."

—♦—

CHIEF JUSTICE BUSHE, on being told that the judges in the Court of Common Pleas had little or nothing to do, remarked, "Well, well, they're quite equal to it."

¹ Lord Mordington's Case, Fort. 165.

IN a case in *Liber Assissarum*, J. was indicted for battery of R. and sued R. in trespass for the same battery: plea, son assault demesne, and issue thereon. T. H. one of those who indicted (found the bill), was of the inquest on the trial of the action of trespass, and gave a verdict for the plaintiff with twenty shillings damages: and T. H. was committed to the custody of the marshal, and fined for two causes, one of which was, that he was one of the indicters of the said J. whom now he has acquitted, and did not challenge himself.¹



LORD CLARE one day brought a Newfoundland dog upon the bench, and began to caress the animal while Curran was addressing the Court. Of course, the latter stopped. "Go on, go on, Mr. Curran," said his lordship. "Oh! I beg a thousand pardons, my lord," returned the advocate: "I really thought your lordship was employed in consultation."



CRABB ROBINSON, just called to the bar, told Charles Lamb exultingly that he was retained in a cause in the King's Bench. "Ah," said Lamb; "the first great cause, least understood."

¹ *Lib. Assis.* 40 *Edw. III.* f. 241, A. pl. 10. 8 *Ad. & El.* 834 note.

LORD KENYON thus addressed a dishonest butler who had been convicted of stealing large quantities of wine from his master's cellar: "Prisoner at the bar, you stand convicted, on the most conclusive evidence, of a crime of inexpressible atrocity, — a crime that defiles the sacred springs of domestic confidence, and is calculated to strike alarm into the breast of every Englishman who invests largely in the choicer vintages of Southern Europe. Like the serpent of old, you have stung the hand of your protector. Fortunate in having a generous employer, you might, without dishonesty, have continued to supply your wretched wife and children with the comforts of sufficient prosperity, and even with some of the luxuries of affluence; but dead to every claim of natural affection, and blind to your own real interest, you burst through all the restraints of religion and morality, and have for many years been feathering your nest with your master's bottles."

JEKYLL one day received an invitation to Lansdowne House, but excused himself by a prior engagement to meet the judges. During the dinner a part of the ceiling at Lansdowne House fell in. Jekyll afterwards described his escape thus: "I was asked to *ruat cælum*, but dined instead with *fiat justitia*."

A MAN having been convicted of bigamy before Mr. Justice Maule, the following dialogue took place : —

CLERK OF ASSIZE. What have you to say why judgment should not be passed upon you according to law?

PRISONER. Well, my lord, my wife took up with a hawker, and ran away five years ago; and I have never seen her since, and I married this woman last winter.

MR. JUSTICE MAULE. I will tell you what you ought to have done; and, if you say you did not know, I must tell you that the law conclusively presumes that you did. You ought to have instructed your attorney to bring an action against the hawker for criminal conversation with your wife. That would have cost you about a hundred pounds. When you had recovered substantial damages against the hawker, you should have instructed your proctor to sue in the Ecclesiastical Courts for a divorce *a mensâ et thoro*. That would have cost you two hundred or three hundred pounds more. When you had obtained a divorce *a mensâ et thoro*, you would have had to appear by counsel before the House of Lords for a divorce *a vinculo matrimonii*. The bill might have been opposed in all its stages in both Houses of Parliament, and altogether you would have had to spend about a thousand or twelve hundred pounds.

You will probably tell me that you never had a thousand farthings of your own in the world; but, prisoner, that makes no difference. Sitting here as a British judge, it is my duty to tell you that this is not a country in which there is one law for the rich, and another for the poor.



THE following is an extract from a case decided by the Supreme Judicial Court of Massachusetts. The facts are sufficiently stated in the opinion, which was delivered by Mr. Justice Cushing:—

“Eliakim Willis was pastor of the parish of Malden; a bachelor, or a widower without children: a devout old man of the state of theological opinion prevailing at the close of the last century, when Puritanism, though ceasing to be exclusive, was not the less earnest and sincere. He was from New Bedford, where he had a brother, Ebenezer Willis, still living: and he retained there, as a reminiscence of his youth, the old family pew in the North Meeting House. By prudence and care he had economized out of his modest salary as a country clergyman a decent estate, consisting chiefly of land. His brothers, Ebenezer and Jireh, were, it may be presumed, reasonably well off; for he bequeathed to them by his will some personal objects only, as tokens of remembrance and affec-

tion. He had a widowed sister, Mercy Marchant, for whose comfortable support through life he provided. He remembered the church in which he had so long ministered, and gave to it his favorite copy of the Bible, to be read in public on every Lord's Day.

“He then looked around for some object of general philanthropy worthy of his regard. He doubted, but on the whole came to a wise conclusion, and resolved to make a donation to the Society for the Propagation of the Gospel among the Indians, who, he might have reflected, had not been over-well treated, either by England or by her colonies in New England. As to family connections, he had a favorite niece, who had passed through her romance of youth, had married, and been left by her deceased husband a widow, with two children, but without property, and had been invited by her good uncle to look to him for support, and probably been taken into his family. Among the parishioners of Mr. Willis was a substantial and worthy gentleman, himself a widower, apparently with a child or children. A very natural event followed. Col. Popkin married the still comely widow; and a third family grew up under the eyes, and enjoying the affection, of Mr. Willis. Such was the condition of the family when the will was made.

“Mr. Willis looked considerably after his own

affairs, but consulted Col. Popkin, and was tenderly cared for by his niece, Mrs. Popkin. They were his children in affection. Accordingly, in making general disposition of his property, he divided the bulk of it equally between the fruits, respectively, of the first and second marriages of his niece, providing, however, that she should have the improvement of the whole estate during her natural life. But here doubts as to the law came into his mind. The spectre of the celebrated rule in *Shelley's Case* rose before him. Perhaps, for it happened during his life, he had read or heard of the tribulation and perplexities of the Earl of Mansfield in the case of *Perrin v. Blake*. And accordingly, after making the devise to the two sets of his niece's children, with reservation of a life estate in his niece, he added the following words: 'If it is not contrary to the laws of this Commonwealth—the preceding article notwithstanding—if it is contrary, this item I hereby make null and void, so as in no way to affect the other items of this my last will.' In this way his niece and her children were amply considered, and the whole office of gratitude and love to them, and each of them respectively, was faithfully performed so far as the case would allow it to be done.”¹

¹ *Popkin v. Sargent*, 10 Cush. 332, 333.

IN the case of *James v. Commonwealth*, 12 S. & R. 220. it was decided that the ducking-stool is not the punishment of a common scold in Pennsylvania. Mr. Justice Duncan delivered a very lengthy and amusing opinion, in which he exhausted the entire learning on the subject. We present two short extracts; but the whole opinion is well worthy of perusal. “Now, I ask,” he says, “with as much gravity as I can command, if Mrs. Thrale—the widow of the great brewer Thrale, the rich, learned, accomplished, and fashionable Mrs. Thrale—had not put sufficient malt in her liquor, if she should be exposed to the punishment of the cucking-stool, and be ducked in stinking water; or if the celebrated Dr. Johnson—the leviathan of learning, the executor of Mr. Thrale’s will—had broken the assize, if the pillory would have been his punishment? for I think we are informed by Mr. Boswell that he saw him in the brewery, attending to its concerns, and bustling about, with his inkhorn tied to the button of his coat; or would he be ducked in stereore, for Jacobs, in his Dictionary informs us the trebucket was a punishment for brewers and bakers, who were ducked in stereore, or in stinking water; and we must never forget that the law professes equality of punishment; that the common law, which stamps freedom and equality upon all who are subject to it, which protects and punishes with an equal hand

the high and the low, the proud and the humble, I say professes, for in the trebucket punishment we shall presently see that it was never intended for the rich, and never was inflicted on beauty and youth."

And again, at p. 235: "I am far from professing the same reverence for all the degrading and ludicrous punishments of the early days of the common law, — I am far from thinking that this is an unbroken pillar of the common law, or that to remove this rubbish would impair a structure which no man can admire more than I do. But I must confess I am not so idolatrous a worshipper as to tie myself to the tail of this dung-cart of the common law."



SIR FLETCHER NORTON, whose want of courtesy was notorious, happened, while pleading before Lord Mansfield on some question of manorial right, to say, "My lord, I can illustrate the point in an instant in my own person. I myself have too little *manors*." — "We all know it, Sir Fletcher," interposed the judge with one of his blindest smiles.



SELF-DEFENCE is the clearest of all laws; and for this reason, — the lawyers didn't make it. — *Douglas Jerrold*.

IN a very recent case a learned judge thus suggestively premises his opinion: "The full argument of counsel, occupying *seventeen entire days*, and an examination of the records, have satisfied me," etc. It has been well said that there must remain some humor and some patience in the Fifth Circuit.¹

— ♦ ♦ ♦ —

WHEN Daniel O'Connell, while conducting a case before Lord Norbury, observed, "Pardon, my lord, I am afraid your lordship does not apprehend me," the Chief Justice (alluding to a report that O'Connell had avoided a duel by surrendering himself to the police) retorted, "Pardon me also: no one is more easily apprehended than Mr. O'Connell — whenever he wishes to be apprehended."

— ♦ ♦ ♦ —

IN the perusal of a very solid book on ecclesiastical law, including the progress of the ecclesiastical differences in Ireland, written by a native of that country, after a good deal of tedious and vexatious matter, the reader's complacency is restored by an artless statement how an eminent person "abandoned the errors of the Church of Rome, and adopted those of the Church of England."

¹ Gaines v. Lizardi, 3 Woods C. C. 78.

“I HEAR,” said somebody to Jekyll, “that our friend Smith the attorney is dead, and leaves very few effects.” — “It could scarcely be otherwise,” returned Jekyll: “he had so very few causes.”

THE following is a specimen of Mr. Justice Maule’s way of addressing a jury: —

Gentlemen, the learned counsel is perfectly right in his law. There is *some* evidence upon that point. But he is a lawyer, and you are not; and you don’t know what he means by *some* evidence, and so I’ll tell you. Suppose there was an action on a bill of exchange, and six people swore they saw the defendant accept it, and six others swore they heard him say that he should have to pay it, and six others knew him intimately, and swore to his handwriting. And suppose, on the other side, they called a poor old man who had been at school with the defendant forty years before, and not seen him since, and he said he rather thought the acceptance was not his writing: why, there would be *some* evidence that it was not. And that is what the learned counsel means in this case.

“THE formality of the law is the prudery of a harlot.”¹

¹ Phillimore Ev. 206.

“MY client,” said an Irish advocate, pleading before Lord Norbury in an action for trespass, “is a poor man. He lives in a hovel, and his miserable dwelling is in a forlorn and dilapidated state; but, thank God! the laborer’s cottage, however ruinous its plight, is his sanctuary and his castle. Yes, the winds may enter it, and the rain may enter it; but the King cannot enter it.” — “What, not the *reigning* king?” inquired his lordship.

—♦♦—

GILBERT A BECKETT celebrated his elevation to the office of magistrate at the Greenwich Police Court by a characteristic pun. A gentleman came before him to prefer a charge of robbery with violence, committed in the middle of the night. In stating his case he mentioned that the assault occurred while he was returning home from an evening party. The worthy magistrate interrupted him by observing, “Really, sir, I cannot make up my mind to accept any thing like an *ex parte* statement.”

—♦♦—

IN Finch’s Law, p. 220, sorcery is thus defined: “Sorcery is a consulting with devils, and containeth under it conjuring, necromancy, and such like.”

A BARRISTER opened a case very confusedly before Mr. Justice Maule. "I wish, sir," interrupted the judge, "you would put your facts in some order: chronological order is the best; but I am not particular. Any order you like,—alphabetical order."



A CURIOUS case is reported in the Year Book, 4 Henry VII. 5, in which an ecclesiastical chancellor, Archbishop Morton, threatened a defendant with punishment in the next world, as the common law could not reach him in this. The suit was against an executor who had released a debt due to the testator without the assent of his coexecutor. It was argued that the law gave no remedy against such an act.

CHANCELLOR. Sir, I know well that every law is, or of right ought to be, according to the law of God; and the law of God is that an executor who is of evil disposition shall not expend all the property; and I know well that if he does so, and does not make amends, or is not willing to make restitution, if it be in his power, he shall be damned in hell.



A PETITION to the House of Lords was once rejected for omitting the word "humbly."¹

¹ 40 Parl. Del. 1270.

MRS. J. L., who was a widow and childless, aged seventy-five, within a few days after first seeing H., who claimed to be a "spiritual medium," was induced, from her belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of H., to adopt him as her son, and transfer twenty-four thousand pounds to him, to make her will in his favor, afterwards to give him a further sum of six thousand pounds, and also to settle upon him, subject to her life-interest, the reversion of thirty thousand pounds, — these gifts being made without consideration and without power of revocation. Of course in a Court of Equity these voluntary gifts were set aside.¹

SIR G. M. GIFFARD, V. C.: "I have to observe that the system of 'spiritualism' as presented by the evidence is mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish, and the superstitious; and on the other to assist the projects of the needy and of the adventurer; and lastly, that beyond all doubt there is plain law enough and plain sense enough to forbid and prevent the retention of acquisitions such as these by any 'medium,' whether with or without a strange gift; and that this should be so is of public concern, and, to use the words of Lord Hardwicke, 'of the highest public utility.'"

¹ Lyon v. Home, L. R. 6 Eq. 655.

A MAN being condemned to the pillory in or about Elizabeth's time, the foot-board on which he was placed proved to be rotten, and down it fell, leaving him hanging by the neck in danger of his life. On being liberated, he brought an action against the town for the insufficiency of its pillory, and recovered damages.



A GENERAL principle of universal application is thus tersely expressed: "A contract in one place makes a man a debtor in every place." 1 Saund. 74, 6th ed.



A BAILIFF who had been compelled to swallow a writ, rushing into Lord Norbury's court to proclaim the indignity done to justice in his person, was met by the expression of a hope that the writ was "*not returnable* in this court."



WHERE a party has the power to consummate the marriage by sexual intercourse, but refuses to do it, this is not impotency; but it is doubtful whether it is not malicious desertion, justifying divorce.¹

¹ The case of Southwick v. Southwick, 97 Mass. 327, and Cowles v. Cowles, 112 Mass. 298, decide that it is not.

SIC utere tuo ut alienum non laedas. This maxim was once discarded unceremoniously by Mr. Justice Erle. "The maxim," he said, "is mere verbiage. A party may damage property where the law permits, and may not where the law prohibits: so that the maxim can never be applied till the law is ascertained; and when it is, the maxim is superfluous."¹



LORD ABINGER had a clear way of putting a point. When a question was raised by government with respect to the right of persons to take water from Portsmouth Harbor, Lord Abinger said: "An old woman must not take a bucket of water from that harbor, lest a seventy-four should not float."²



IN The Case of Swans, 7 Rep. 16, it was held that the swan is a royal fowl, and that all *white* swans *not marked*, which have gained their natural liberty, and are found swimming in an open and common river, may be seized to the King's use by his prerogative. Whether the same prerogative applies to *black* swans the authorities do not inform us.

¹ Bonomi v. Backhouse, El. Bl. & El. 643; 27 L. J. Q. B. 388.

² Per Alderson, B. in Embrey v. Owen, 15 Jur. p. 636.

REX v. JOHNSON, Comberbach, 377. The marginal note runs thus: "Fine on indictment for lying with another man's wife. Q." The report states that "The defendant appeared to be fined upon an indictment for seducing and lying with another man's wife. Northy moved to charge him with an action; but the Court would not suffer that, now he comes to submit to a fine."



IN a recent case in Louisiana, Mr. Justice Howe uses the following language in delivering the judgment: "We need in criminal matters the 'justice, mercy, and truth' of the common law, and not its 'mint, anise, and cumin.' There is no more need that the State of Louisiana should make vain repetitions in her pleadings than there is that her Christians should make them in their prayers."¹



IN the preface to Fortescue's Reports, which consists of thirty-one folio pages, we are informed that "The grand division of law is into the divine law and the law of nature; so that the study of law in general is the business of men and angels. Angels may desire to look into both the one and the other; but they will never be able to fathom the depths of either."

¹ State v. Phelps, 24 La. Ann. 492.

IN *The Queen v. Hartnett*, Jebb, C. C. 302, the judge omitted, in pronouncing sentence on a conviction for murder, to order that the bodies of the prisoners should be buried within the precincts of the jail, as directed by statute; but on a subsequent day, on ruling the book at the close of the same assizes, in the absence of the prisoners, ordered the above clause to be inserted. It was held by a majority of the judges that the original sentence of death was illegal, because it did not contain an order that the bodies should be buried within the precincts of the jail; that the statute was not merely directory, but made the order a part of the sentence. The prisoners were discharged.



IN the case of *Drake v. State*, 51 Ala. 30, is this note in the margin by the reporter: "The reporter does not believe that the opinion in this case was intended to change the settled rule of law as laid down in the several cases cited, and he has therefore made the head-note conform to those cases, and not to the language of the opinion."



MR. JUSTICE MAULE once asked, "What difference is there between 'discretion' and 'sound discretion?'"¹

¹ *Regina v. Darlington*, 6 Q. B. 700.

“THE Albany Law Journal” makes mention of a statute of New York which allowed deductions of a certain number of days to be made on account of good behavior from the term of imprisonment of convicts, with a proviso that the statute should not apply to any person *sentenced for the term of his natural life*.



WE see that works of nature are best preserved from their own beginnings, frames of policy are best strengthened from the same ground they were first founded, and justice is ever best administered when laws be executed according to their true and genuine institution.¹



A WITTY reporter writes this head-note: “It seems that a married man intending to effect seduction may blunder into bigamy.”²



LAWS are often mere notice-boards set up in out-of-the-way places where no one can read them. If you wish to keep people off a road, close it with a barrier that stops the most heedless man at the very entrance. It is better to make trespass impossible than forbid it. — *Joubert*.

¹ Pref. to 8 Rep. p. xxvi. ² *Hayes v. People*, 25 N.Y. 390.

PROFESSOR CHRISTIAN says that the description of law given by Demosthenes is perhaps the nearest perfect and the most satisfactory that can be found or conceived:¹—

“The design and object of laws is to ascertain what is just, honorable, and expedient; and when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all. This is the origin of law, which, for various reasons, all are under an obligation to obey, but especially because all law is the invention and gift of Heaven, the sentiment of wise men, the correction of every offence, and the general compact of the State; to live in conformity with which is the duty of every individual in society.”²



THERE are some acts of justice which corrupt those who perform them. — *Joubert*.

¹ 1 Bl. Comm. 44 note, 12th ed.

² Cont. Aristog. I. § 19. Kennedy translates: “Laws desire what is just and honorable and useful; they seek for this, and when it is found, it is set forth as a general ordinance, the same and alike for all; and that is law, which all men ought to obey for many reasons, and especially because every law is an invention and gift of the Gods, a resolution of wise men, a corrective of errors intentional and unintentional, a compact of the whole State, according to which all who belong to the State ought to live.” Cf. Hooker’s noble description of Law, in Eccles. Polit. I. 16, 8, and Church’s Notes, p. 135, where he compares Dante, *Paradi.* I. 104–121.

THE absurdity of requiring a plurality of witnesses, except in cases of treason, perjury, etc., is illustrated in a case in which a husband, having, with a female servant, found his wife with her paramour, recovered before a jury five hundred pounds damages of the latter, but in the Ecclesiastical Court was refused a divorce which was prayed for upon the same evidence.¹

A JUSTICE of the peace sends the servant of L. R. to the house of correction for being saucy, and giving too much corn to his horses. The Court held this was not a sufficient cause to send a man to the house of correction.² According to a crown case reserved, decided long afterwards, the servant might have been committed for larceny.³

SHOWER reports a case of sharp practice, in which "the attorney and counsel both were checked for this snapping practice;" and they were told by Seroggs, Chief Justice, that "since you have gone so vigorously to work, we will use the rigor of the law against you."⁴

¹ *Evans v. Evans*, 1 Robertson Eccl. 165.

² *The King v. Okey*, 8 Mod. 45.

³ *The King v. Morfit, Russell & Ryan* C. C. 307.

⁴ *Harwood v. Wheeler*, 2 Show. 79.

CHIEF BARON POLLOCK observed, in the course of the argument of a crown case reserved: "The word 'indecently' has no definite legal meaning: and with respect to the word 'presence,' I remember that in our older courts of justice the judge retired to a corner of the court for a necessary purpose, even in the presence of ladies. That, perhaps, would be considered indecent now."¹



JUSTICE is truth in action. — *Joubert*.



MR. JOHN MITCHELL KEMBLE once related, that among other illustrations of ancient tenures, forest rights, etc., which he had picked up at Addlestone, was the custom of deciding how far the rights of the owner of land extended into the stream on which his property is situated by a man standing on the brink with one foot on the land, and the other in the water, and throwing a tenpenny hatchet into the water: where the hatchet fell was the limit. This he had learned from an old man born and bred in the forest who remembered having once seen it done.²

¹ Regina v. Webb, 2 C. & K. 938.

² The Nineteenth Century, July, 1881, p. 75.

NO man ought to fill the position of both advocate and judge at the same time and place. The following anecdote sets this in a stronger light than any discussion of the subject. Whilst a prisoner was being tried before a commissioner, the solicitor for the defence asked his counsel to raise some frivolous objection. The counsel refused, on the ground that the commissioner would overrule it. The solicitor replied, "Oh! he is all right. I have just given his clerk a brief."¹



MR. JUSTICE MAULE was in the act of passing sentence upon a man, when the governor of the county jail came to the table to deliver some calendars to members of the bar, and in so doing passed between the prisoner and the judge, who thereupon intimated to the governor that in so doing he had outraged one of the best known conventional rules of society. "Don't you know," said the judge, "you ought never pass between two gentlemen when one gentleman is addressing another?" The offender against this conventional rule apologized and retired, whereupon the judge sentenced the other gentleman to seven years' transportation.

¹ Sir James Stephen, in *The Nineteenth Century*, December, 1877, p. 744.

IN an action to recover damages for an illegal invasion, by imitation, of the plaintiff's trade-mark for the sale of a certain washing powder, Mr. Justice Sanderson gives this description of the plaintiff's label : —

“The plaintiff's label commences with a highly-colored picture, representing a washing-room with tubs, baskets, clothes-lines, etc. There are two tubs painted yellow, at each of which stands a female of remarkably muscular development, with arms uncovered, and clad in a red dress, which is tucked up at the sides, exposing to view a red petticoat with three black stripes running around it near the lower extremity. Each is apparently actively engaged in washing; and clouds of steam are gracefully rolling up from the tubs, and dispersing along the ceiling. In the background is extended across the room a clothes-line, upon which are suspended stockings and other undergarments, which have evidently just been put to use in testing the cleansing properties of the plaintiff's washing powder. To the left of the washerwomen stands a lady in a yellow bonnet, red dress, green Congress gaiters, and hoops of ample circumference; upon her left arm is suspended a yellow basket; and in her left hand, which is encased in a red glove, is held a red parasol; while the right, which is encased in a green glove, is gracefully extended towards the

nearest washerwoman in an attitude of earnest entreaty. In the immediate foreground is a yellow and green clothes-basket full of dirty linen, and a yellow and green soap packing-box, upon which are printed in small capitals, the words, 'Standard Co.'s Soap.' Each washtub is supported by a four-legged stool, some of the legs being yellow, some red, some green, and some all three. The floor of the room, as to color, is in part of a yellowish green, and in part of a greenish red; while the walls are of a grayish blue. This is but an imperfect description of the picture with which the plaintiff's label is adorned. The design is good, for it is eminently suggestive of the character of the plaintiff's goods."

The learned judge then proceeds to give an humorous description of the defendant's labels.¹



SIR JOHN NICHOLL, in pronouncing judgment in one case, said that the woman was past the age of child-bearing at the time of the marriage, therefore the primary and most legitimate object of wedlock, the procreation of issue, could not operate: and a man of sixty who marries a woman of fifty-two should be contented to take her *tanquam soror*."²

¹ Falkinburg v. Lucy, 35 Cal. 52, 61.

² Brown v. Brown, 1 Hagg. Eccl. 523.

IN a celebrated case, Pollock, C. B., observed:¹
“We have had in this county no Court of Criminal Equity since the Star Chamber was abolished, as Lord Campbell called it, in a case which was tried before him.”²

IN *Webb v. Weatherby*, 1 Bing. N. C. 504, counsel, contending that a replication was ill, urged in conclusion, that “a departure from forms so long established will weaken the foundation and shake the whole fabric of the law of England.” Tindal, C. J., quietly said: “I hope the law of England will not be much disturbed if we overrule this demurrer.”

THE marginal note to *Clement's Case*, 1 Lewin C. C. 113, runs thus: “Possession in Scotland evidence of stealing in England.” This is the summary of a case of horse-stealing tried at Carlisle, the evidence being that the horse was a few days afterwards found in the prisoner's possession across the border; and it has been made the ground for much gibing by the English, at the acquisitive propensities of their Northern brethren.

¹ *Attorney General v. Sillem*, 2 H. & C. 509.

² *Emperor of Austria v. Day*, 3 DeG. F. & J. 239.

LORD ELDON lent two large volumes of precedents to a friend, and could not recollect to whom. In allusion to such borrowers, he observed, that, “though backward in *accounting*, they seemed to be practised in *book-keeping*.”

IT may be a consolation to the bar to know that many years ago the Court of Common Pleas refused to hear an affidavit read, because the barrister therein named had not the addition “esquire” to his name.¹

“THE King being God’s lieutenant cannot do a wrong.”—11 Rep. 72 a.

THERE is a very ancient precedent of judges going *circuit*. “And he went from year to year in circuit to Bethel, and Gilgal, and Mizpah, and judged Israel in all those places.”—1 SAM. vii. 16.

BY the Court: “You cannot change your attorney without leave of Court, to be obtained on motion, though he be ever so great a cheat.”²

¹ 1 Wils. 245.

² 7 Mod. 50.

IN an action against a railway company for personal injury to a passenger, a medical practitioner of eminence, the jury, in assessing the damages, may take into their consideration the loss he has sustained through his inability to continue a lucrative professional practice.¹ At the first trial the jury awarded the plaintiff seven thousand pounds damages. The Queen's Bench Division directed a new trial, on the ground of the inadequacy of the damages, conceiving that the jury had failed to take into account all the heads of damage in respect of which the plaintiff was by law entitled to compensation; more especially the pecuniary loss which he had sustained through his inability to practise his profession.² The decision of the Queen's Bench Division was affirmed by the Court of Appeal.³ At the second trial the jury awarded the plaintiff sixteen thousand pounds.



ONE of the Seven was wont to say that laws were like cobwebs; where the small flies were caught, and the great brake through.⁴

¹ Phillips v. London & South Western Railway Co. 5 C. P. D. 280.

² 4 Q. B. D. 406.

³ 5 Q. B. D. 78.

⁴ Bacon's *Apothegms*, No. 181. Cf. Webster, *The Famous History of Sir Thomas Wyatt*, ed. Dyce 1859, p. 201:—

“Great men, like great flies, through law's cobwebs break.”

A COUNSEL thought that he would overcome Lord Norbury on the bench. So on one day when Lord Norbury was charging a jury, and the address was interrupted by the braying of a donkey: "What noise is that?" cried Lord Norbury. "'Tis only the echo of the Court, my lord," answered Counsellor Readytongue. Nothing disconcerted, the judge resumed his address; but soon the barrister had to interpose with technical objections. While putting them, again the donkey brayed. "One at a time, if you please," said the retaliating joker.



MAXIMS are to the intellect what laws are to actions: they do not enlighten, but they guide and direct, and, although themselves blind, are protective. They are like the clew in the labyrinth, or the compass in the night. — *Joubert*.



THERE is a curious anecdote related of Sir Thomas Moore. He one day invited the judges to dine with him, and after dinner showed them the number and nature of the cases in which he had granted injunction to the Courts of Common Law. The judges, upon full debate of the matters, confessed that *they could have done no otherwise themselves*.

THE St. 7 & 8 Geo. IV. ch. 30, § 16 enacts that "If any person shall unlawfully and maliciously kill, maim, or wound *any* cattle," he shall be guilty of felony. The prisoner was indicted under this statute for killing a gelding. Sir Gregory Lewin, for the prisoner, moved in arrest of judgment, and contended that the indictment ought to have averred that the gelding was "cattle." He referred the presiding judge to Dr. Johnson's definition of a gelding, viz., "any animal that is *castrated*," and to the following well-known couplet in Hudibras:—

"The sow-gelder blew his horn
To geld a cat, but cried reform."

On a case reserved, the indictment was held to be sufficient.¹



THERE is an amusing story told of Lord Camden, when a barrister, having been fastened upon the stocks on the top of a hill, in order to gratify an idle curiosity on the subject. Being left there by the absent-minded friend, who had locked him in, he found it impossible to procure his liberation for the greater part of the day. On his entreating a chance traveller to release him, the man shook his head and passed on, remarking that of course he was not put there for nothing.

¹ Clark's Case, 1 Lewin C. C. 229, 232.

REMORSE is the punishment of crime; repentance, its expiation. The former appertains to a tormented conscience; the latter, to a soul changed for the better. — *Joubert*.



A CERTAIN Mr. Nathaniel Redding, who had formerly practised at the bar, had been convicted before justices of oyer and terminer, by virtue of a special commission, for endeavoring to persuade a witness against the noblemen imprisoned in the Tower to forbear his prosecution of them. For this offence Mr. Redding was set in the pillory, and fined one thousand pounds, with imprisonment till it was paid. The King [Charles II.] remitted his fine; and when discharged, he came into court, requiring an information, at his suit, to be filed against the commissioners who had condemned him: “of whom,” says the reporter (who was afterwards successively a judge in each of the three superior courts), “my brothers Jones and Dolben were two.” The Court declared him incompetent to do so, and caused his words, accusing the two judges of oppression, to be recorded; and then “for having uttered those words, and having also become infamous by standing on the pillory, the gentlemen at the bar *did pray that his gown might be pulled over his ears; which was ordered and executed in court*: and he

was also condemned in court to pay the King a fine of five hundred pounds, and be imprisoned till he paid it.”¹

This case has been presented to the reader because of the singularity of its circumstances. It appears to be also the only instance recorded in our books of misconduct by a member of the bar, judicially cognizable, and punished because of his being such: a fact of itself eloquently significant.



MR. JUSTICE MAULE, in summing up a case of libel, and speaking of a defendant who had exhibited a spiteful piety, observed: “One of these defendants is, it seems, a minister of religion: of *what* religion does not appear; but to judge by his conduct, it cannot be any form of Christianity.”



THE reason of the law is the life of the law; for though a man can tell the law, yet, if he know not the reason thereof, he shall soon forget his superficial knowledge. — Co. Litt. 183 b.

¹ Sir Thomas Raymond's Reports, p. 376, headed thus: “Memorandum, June 18, 1680.” “He seemed to complain much,” adds Raymond, “for not being allowed a writ of error to reverse his judgment before the commissioners.” On the last day of term his fine and imprisonment were remitted on his petition; a recognizance, however, being taken for his good behavior.

NIHIL habeat forum ex scenâ is one of Bacon's maxims; but he there refers to fictitious cases brought into the courts in order to determine points of law.¹ Sergeant Maynard, who died in the reign of William III., is said to have had "the ruling passion strong in death" to such a degree, that he left a will purposely worded so as to cause litigation, in order that sundry questions which had been "moot points" in his lifetime might be settled for the benefit of posterity.



LORD COKE says that the official reporters ceased about the end of the reign of Henry VII.; and the reason he gives for it is sufficiently quaint: "So as about the end of the reign of Henry VII. it was thought by the sages of the law that at that time the Reports of the law were sufficient, wherefore it may seem unnecessary and unprofitable to have any more reports of the law." — 3 Rep. xxix.



IN the comprehensive words used by the Court in 6 Mod. 231, the bail have the principal always upon the string, and may pull it when they please, to render him in their own discharge. — 8 Pick. 140.

¹ See De Augm. Scient. lib. viii. cap. 3, aph. 91. Works, vol. V. p. 107, ed. Ellis and Spedding.

PUNCH ON SPECIAL PLEADING.

INTRODUCTION.

BEFORE administering law between litigating parties, there are two things to be done, in addition to the parties themselves, — namely, first to ascertain the subject for decision, and, secondly, to complicate it so as to make it difficult to decide. This is effected by letting the lawyers state in complicated terms the simple cases of their clients, and thus raising from these opposition statements a mass of entanglement which the clients themselves might call nasty crotchets, but which the lawyers term “nice points.” In every subject of dispute with two sides to it, there is a right and a wrong; but in the style of putting the contending statements, so as to confuse the right and the wrong together, the science of special pleading consists. This system is of such remote antiquity that nobody knows the beginning of it, and this accounts for no one being able to appreciate its end. The accumulated chicanery and blundering of several generations, called in forensic language the “wisdom of successive ages,” gradually brought special pleading into its present shape, or, rather, into its present endless forms. Its extensive drain on the pockets of the suitors has rendered it always an important branch of legal study; while, when

properly understood, it appears an instrument so beautifully calculated for distributive justice, that, when brought to bear upon property, it will often distribute the whole of it among the lawyers, and leave nothing for the litigants themselves.

CHAPTER I.

OF THE PROCEEDINGS IN AN ACTION, FROM ITS COMMENCEMENT TO ITS TERMINATION.

ACTIONS are divided into *Real*, in which there is often much sham; *Personal*, in which the personality is frequently indulged in by counsel, at the expense of the witnesses; and *Mixed*, in which a great deal of pure nonsense sometimes prevails. The Legislature, being at last sensible to the shamness of *Real* and the pure nonsense of *Mixed* actions, abolished all except four; and for the learning on these subjects, now become obsolete, we must refer to the "books," which have been transferred to the shops of Butter from the shop of Butterworth.¹

There are three superior Courts of Common Law, one of their great points of superiority being their superior expense, which saves the Common Law from being so common as to be positively vulgar; and its high price gives it one of the qualities of a luxury, rendering it *caviare* to the

¹ Butterworth, the Law Publisher in Fleet Street.

million, or indeed to any but the *millionnaire*. These courts are the Queen's Bench, — a bench which five judges sit upon; the Exchequer, whose sign is a chess or draught board, some say to show how difficult is the game of law, while others maintain it is merely emblematic of the drafts on the pockets of the suitor; and, thirdly, the Common Pleas, which took its title, possibly, from the fact of the lawyers finding the profits such as to make them un-Common-ly Pleas'd.

The real and mixed actions not yet abolished are, first, the Writ of Right of Dower, and second, the Writ of Dower; both relating to widows: but as widows are formidable persons to go to law against, these actions are seldom used. The third is the action of Quare Impedit, which would be brought against me by a parson if I kept him out of his living; but, as the working parsons find it difficult to get a living, this action is also rare. The fourth is the action of Ejectment, for the recovery of land, which is the only action that cannot be brought without some ground.

Of personal actions, the most usual are debt, and a few others: but we will begin by going into debt as slightly as possible. The action of debt is founded on some contract, real or supposed; and when there has been no contract, the law, taking a contracted view of matters, will have a contract implied. Debt, like every other personal action,

begins with a summons, in which Victoria comes "greeting;" which means, according to Johnson, "saluting in kindness," "congratulating," or "paying compliments at a distance:" but, considering the unpleasant nature of a writ at all times, we cannot help thinking that the word "greeting" is misapplied. The writ commands you to enter an appearance within eight days; and, by way of assisting you to make an appearance, the writ invests you, as it were, with a new suit.

The action of Covenant lies for breach of covenant, that is to say, a promise under seal; and under wafer it is just as binding, for you are equally compelled to stick to it like wax.

The action of Detinue lies where a party seeks to recover what is detained from him, though it does not seem that a gentleman detaining a newspaper more than ten minutes at a coffee-house would be liable to detinue, though the action would be an ungentlemanly one, to say the least of it.

The action of Trespass lies for an injury committed with violence, such as assault and battery, either actual or implied; as if A, while making pancakes, throws an egg-shell at B, the law will imply battery, though the egg-shell was empty.

The action of Trespass on the Case lies where a party seeks damages for a wrong to which trespass will not apply, — where, in fact, a man has

not been assaulted or hurt in his person, but where he has been hurt in that tender part, his pocket. Of this action there are two species, called *assumpsit* — by which the law, at no time very unassuming, assumes that a person legally liable to do a thing has promised to do it, however unpromising such person may be — and *trover*, which seeks to recover damages for property which it is supposed the defendant found and converted; so that an action might perhaps be brought in this form to recover from Popery those who have been found and converted to the use, or rather lost and converted to the abuses, of the Romish Church.

Having gone slightly into the different forms of actions: having just tapped the reader on the shoulder with a writ in each case, which, by the way, should be personally served on him at home, though the bailiff runs the risk of getting sometimes served out, we shall proceed to trial — perhaps of the reader's patience — in a subsequent chapter.

CHAPTER II.

OF THE DECLARATION.

THE writ being now served, it is next to be returned, and this is sometimes done by giving it back at once to the bailiff, or throwing it in his face. Such quick returns as these would bring such very small profit to a plaintiff, that they are not allow-

able; and the writ can only be returned by the sheriff bringing it back, on a certain day, into the superior court. He then gives a short account, in writing, of the manner in which the writ has been executed; but if the bailiff has been pumped upon, as we find reported in Shower, or pelted with oysters, as in Shelley's Case, or kicked down stairs, as he was in Foot against the Sheriff, it does not seem that the particulars need be set forth.

If the defendant does not appear within eight days after the writ has come "greeting," as if it would say "my service to you," the plaintiff may, in most cases, appear for him: and this shows how true it is that appearances are often deceitful and treacherous; for, when a plaintiff appears for a defendant, it is only to have an opportunity of appearing against him at the next step.

The pleadings now commence, which were originally delivered orally by the parties themselves in open court, when success might depend on length of tongue; but the parties themselves being got rid of in the modern practice, and the lawyers coming in to represent them, success usually depends on length of purse. The object of pleading, whether oral or written, is to bring the parties to an issue, which means literally a way out; but in practice the effect of getting plaintiff and defendant to an issue is to let them both regularly in.

Almost all pleas, except those of the simplest kind, must be signed by a barrister; who does not usually draw the plea, but he merely draws the half guinea for the use of his name. The pleading begins with the declaration, in which the plaintiff is supposed to state the cause of action, but in which he gives such an exaggerated account of his grievances that not more than one-tenth of what he states is to be believed. For example, if A has had his nose slightly pulled by B, the former proceeds to say that "the defendant, with force and arms, and with great force and violence, seized, laid hold of, pulled, plucked, and tore, and with his fists gave and struck a great many violent blows and strokes on and about divers parts of the plaintiff's nose." If Jones has been given into custody by Smith, without sufficient reason, and Jones brings an action for false imprisonment, instead of saying "he was compelled to go to a station-house," he declares that the defendant, "with force and arms, seized, laid hold of, and with great violence pulled and dragged, and gave and struck a great many violent blows and strokes, and forced and compelled him, the plaintiff, to go in and along divers public streets and highways, to a police office; whereby the plaintiff was not only greatly hurt, bruised, and wounded, but was also kept."

If Snooks's dog bites Thomson's pet lamb,

Snooks declares, "that defendant did wilfully and injuriously keep a certain dog, he, the defendant well knowing that the said dog was and continued to be fierce and mad, and accustomed to attack, bite, injure, hurt, chase, worry, harass, tear, agitate, wound, lacerate, snap at, and kill sheep and lambs; and that the said dog afterward, to wit, on the day of , and divers other days, did attack (etc. etc. down to) and kill one hundred sheep and one hundred lambs of the plaintiff, whereby the said sheep and the said lambs (it will be remembered there was only one lamb) were greatly terrified, damaged, injured, hurt, deteriorated, frightened, depreciated, floored, flustered, and flabbergasted, to the damage of the plaintiff of £ , and therefore he brings his suit."

The various forms of declaration are so numerous, that they fill a volume of seven hundred large pages of Chitty, who is quite chatty on this dry subject, so much does he find to say with regard to it. To this able and amusing writer we refer those who are curious to know how a schoolmaster may declare for "work and labor, care, diligence, and attendance of himself, his ushers and teachers, there performed and bestowed in and about the teaching, instructing, boarding, educating, lodging, flogging, enlightening, thrashing, washing, whipping, and otherwise soundly improving, divers infants and persons." These, and almost

all other conceivable causes of action, are dealt with fully in the pages to which we allude; and all therefore who wish the treat of going to law are referred to the treatise alluded to.



MR. JUSTICE MAULE was noted for splitting straws on the bench, an instance of which is related in connection with special demurrers. A man was described in a plea as "I. Jones;" and the pleader, probably not knowing his name, referred in another part of the plea to "I" as an initial. The judge said that there was no reason why a man might not be christened "I" as well as Isaac, inasmuch as either could be pronounced alone. The counsel for the plaintiff then objected that the plea admitted that "I" was not a name by describing it as an initial. "Yes," retorted the judge; "but it does not aver that it is not a *final* as well as an *initial* letter."



VICE-CHANCELLOR BACON thus discoursed of "the sublime mysteries of special pleading," "the days of which are numbered," said he. "For probably in less than a year we shall only think of them as the phantoms of the past fabulous ages."¹

¹ Job v. Potton, 23 W.R. 590; L.R. 20 Eq. 94.

IN North's Life of Lord Guilford¹ is this account of the preface to Pollexfen's Reports: "By way of remark to show how faction will get the better of common sense and truth, even in men great pretenders to both, I must add that Pollexfen, an arguer for Sir Samuel Barnardiston, since the Revolution, published (or fitted for the press) a book of reports, as they are called, consisting chiefly of his factious arguments; and particularly in this case [Barnardiston v. Soame]; but most brazenly and untruly in his preface, tells how 'he had carried the cause, if the Lord Chief Justice North had not solicited the judges to give a contrary judgment' — or to that effect. This book and preface was shown to the then Lord Chief Justice Holt, who did a singular piece of justice to his lordship's memory and honor; for he sent for the bookseller to answer it before him, and had suppressed the book, if he had not promised to change the preface, and leave out that scandal — which was done; but some copies had escaped before."



LORD HALE doubts whether voluntarily and maliciously infecting a person of the plague, and so causing his death, would be murder. It is hard to see why. He says that "infection is God's arrow." — 1 Hale P. C. 432.

¹ Vol. I. p. 110, ed. 1826.

DURING the legal absence of Mr. (afterwards Lord) Campbell on his matrimonial trip with the *ex-devant* Miss Scarlett, Mr. Justice Abbott observed, when a cause was called on in the Court of King's Bench, "I thought, Mr. Brougham, that Mr. Campbell was in the case." — "Yes, my lord," replied Mr. Brougham, with that sarcastic look peculiarly his own; "he was, my lord; but I understand he is ill." — "I am very sorry to hear that," said the judge. "My lord," replied Mr. Brougham, "it is whispered that the cause of my learned friend's absence is the *scarlet fever*."



IT seems that any person is liable to be committed to prison for his lifetime by the Court of Chancery, as guilty of contempt of court, for not paying that which he has not to pay, and for not doing other impossibilities. What a number of people might be committed for contempt of the Court of Chancery if we all expressed our feelings!



LORD BACON writes of "inconsistency of judgments:" "If it be that previous decisions must be rescinded, at least let them be interred with honor."¹

¹ De Augmentis, Lib. VIII. aph. 95. *Judicia enim reddita, si forte rescindi necesse sit, saltem sepeliuntur cum honore.*

ABOUT the year 1803 Lord Eldon, C., directed an issue to be tried in a court of law for the purpose of having the parties themselves examined in respect of certain transactions in a bankruptcy suit. Mr. (afterwards Lord) Erskine was retained for the plaintiff, who had large pecuniary interests at stake, and Mr. (afterwards Baron) Garrow for the defendant. The plaintiff was called in to the consultation, and, on his entrance, Mr. Erskine sternly addressed to him the following words: "Sir, if you do not wish to go to hell, you must withdraw your record!" It was withdrawn forthwith.¹



LORD ERSKINE, in a letter to Lord Stowell, in 1821, relating to a judgment of the latter in the Court of Admiralty in a case of collision at sea, thus speaks of Lord Kenyon: —

"I remember my excellent friend, the late Lord Kenyon, one of the best and ablest judges and the soundest lawyer, in trying a cause at Guildhall, seemed disposed to leave it to the jury whether the party who suffered might not have saved himself by going on the wrong side of the road, where the witnesses swore that ample room was left. The answer to which is the dangerous uncertainty

¹ This anecdote was related to the late Mr. Samuel Warren by a friend who was professionally concerned in the cause. Warren *Law Studies*, II. 417 note, 3d ed.

of such an attempt, destructive of all the presumptions of conduct founded upon law. Observing that Lord Kenyon was entangled with this distinction, from his observations in the course of the evidence, I said to the jury, in stating the defendant's case: "Gentlemen, if the noble and learned judge, in giving you hereafter his advice and opinion, shall depart from the only principle of safety (unless where collisions are selfish and malicious) and you shall act upon it, I can only say that I shall feel the same confidence in his lordship's general learning and justice, and shall continue to delight, as I always have delighted, in attending his administration of justice: *but I pray God that I may never meet him on the road.*" Lord Kenyon laughed, and the jury along with him: and when he came to sum up he abandoned the distinction, saying to the jury that he believed it to be the best course *stare super antiquas vias*.¹



IN a recent case, the Supreme Court of the United States animadvert upon the practice of introducing children as witnesses in an angry family quarrel, Mr. Justice Wayne quaintly saying that "it cannot be done without its being considered as a forlorn effort of parental obliquity."²

¹ Life of Lord Kenyon p. 345.

² Toby v. Leonards, 2 Wallace, 438.

NO better statement of the use of Abridgments has been given than that contained in "Studii Legalis Ratio," p. 119, A.D. 1675: "As for the Abridgments, though they are of great use as Lord Coke saith *Compendia sunt dispendia*. Abridgments in some cases mistaking the state and truth of the question, and sometimes the right reason and rule of the case, are utterly mistaken. Therefore *Satius est petere fontes quam sectari rivulos*. it is better and safer sailing in the main sea than in rocky havens. When the whole case is set down at large, with all the circumstances and reasons of either side, the point in question is easily apprehended, and many rules of law collected by inference, which out of an abridged case cannot be done."



Nihil quod est inconveniens est licitum is a legal maxim; that is, in the language of a learned lawyer, "it is better that damage should be incurred than that injustice should be perpetrated;" for so he interprets the literal maxim, "The law will sooner suffer a mischief than an *inconvenience*."¹ The substance of the matter is that the law will tolerate the existence of a particular, rather than establish a general, injustice: since *Salus populi, suprema lex*.

¹ Davis v. Waddington 7 M. & G. 41 note by Sergeant Manning.

MR. JUSTICE COLERIDGE, in the maintenance of the principle that even to the representatives of the people, the House of Commons, the most powerful body in the nation, the calumny of its individuals is forbidden, said: "I soberly ask the warmest advocate for this extended privilege, whether any benefit in a land all the institutions of which seek the genial sunshine of public opinion, and must languish without it, can make up for the injury resulting from this, that it should be capable of being said with truth the House of Commons *has become a trader in books, and claims as privilege a legal monopoly in slander.*"¹



THE old notion that a corporation, "having no soul," was incapable of malicious intentions, was recently disregarded as "quaint" and unsubstantial; and it was held, that, in case of a wilful and intentional wrong, an action of tort is maintainable against a corporation where the act complained of is within the purpose of the incorporation, and it has been done in such a manner as that it would constitute an actionable wrong if done by a private individual.²

¹ Judgment in *Stockdale v. Hansard*, 2 P. & D. 218; 9 A. & E. 243.

² *Green v. London General Omnibus Co.* 29 L. J. N. S. 13 C. P.

“THE Common Law jurisdiction,” says, in glowing terms, an able writer on Equity, “is cribbed and confined in its operation in respect of fraud, and does not penetrate beyond the surface; while Equity extends its relief to meet almost every variety of legal subterfuge in all its windings and ramifications, and tracks a covinous defendant into the profoundest recesses of his lair.”¹

“TO beguile the Court, or the party . . . is an artificial deceit, of all others the worst; for hereby the matter is so tricked, shadowed, and heightened by color of painted art as thereby the judges themselves are abused and beguiled.” — 2 Inst. 215.

IN the case of *The King v. The Warden of the Fleet*, 12 Mod. 340, it was objected to a witness that he had been convicted of common barratry, and a record of his conviction was produced, which showed that he had been fined one hundred pounds. Holt, C. J., said: “If he had had the handling of him, he had not escaped the pillory, and that he remembered Sergeant Maynard used to say it were better for the country to be rid of one barrator than of twenty highwaymen.”

¹ Smith Eq. 159.

HERE is an instance of Lord Lyndhurst's good nature. When Cleave the newsvender was tried in the Court of Exchequer on a government information, he conducted his own case, and was treated with much indulgence by Lord Lyndhurst the judge. Cleave began his defence by observing that he was afraid he should, before he sat down, give some rather awkward illustrations of the truth of the adage that "he who acts as his own counsel has a fool for his client." — "Ah, Mr. Cleave," said his lordship with great pleasantry, "ah, Mr. Cleave, don't you mind that adage: it was framed by the *lawyers*."



"A CURSORY and tumultory reading," says Lord Coke, "doth ever make a confused memory, a troubled utterance, and an uncertain judgment."¹ The acquisition of learning will serve but little purpose, unless it be permanently and serviceably *retained*. "What booteth it to read *much*," asks old Philipps, "which is a weariness to the flesh; to meditate often, which is a burthen to the mind; to learn daily with increase of knowledge; when he is to seek for what he hath learned, and perhaps, then especially, when he hath most need thereof? Without this, our studies are but lost labor."²

¹ 6 Rep. Preface. ² Studii Legalis Ratio, 15, A.D. 1675.

IN Lord Campbell's account of the Oxford circuit, A.D. 1810, are the following sketches:¹—

“The man of highest rank upon the circuit was Williams, a king's sergeant, the editor of ‘Saunders.’ Although a very learned man, he was a poor advocate, and was never employed except in *Grimgribber* cases, depending on the law of real property. In one of these a question arose respecting the operation of a *recovery*; and the sergeant laid down a position which Mr. Justice Lawrence, a most learned judge, doubted. But instead of reasoning, or citing cases to support it, the learned sergeant only said, ‘I assure you, my lord, it is so, — upon my honor it is so;’ and Lawrence yielded to the authority.

“The first in junior business was Abbott, afterwards Chief Justice of England. He was then of no mark or likelihood, or supposed to be capable of being more than a puisne judge, an appointment to which he had a kind of prescriptive claim, from having been long ‘Chief Devil to the Attorney General,’ or ‘Counsel to the Treasury,’ and having drawn the indictments for high treason against Hardy, Tooke, and Thelwall. He was the very worst hand at addressing a jury I ever knew to attempt it. He was fully aware of this defect, and only hazarded the effort with great reluctance in the absence of his leader, or when,

¹ Life of Lord Campbell, vol. I. pp. 249-251.

all the silk gowns being retained on the same side, they were forced to give him a leading brief on the other. I remember one such occasion, on the trial of a great *quo warranto* cause, when he had spoken near two hours, and was about to sit down, a barrister present, who thought he was all the time, in his usual vocation of junior, making a formal statement of the questions to be tried, preparatory to the speech of the leader, exclaimed in my ear, ‘What a monstrous time Abbott is in this case in opening the pleadings!’ But his powers expanded as he was elevated, and he became one of the best judges who ever presided in the Court of King’s Bench, not only laying down the law with precision and accuracy, but enforcing his opinion with copiousness of illustration, and elegance of diction.”



IF the dignity of the law is not sustained, its sun is set, never to be lighted up again.¹



IN Wharton’s Case, Yelv. 24, which was an indictment for murder, the jury returned a verdict of not guilty. “Wherefore Popham, Gawdy, and Fenner *fuere* *valde irati*, and all the jurors were committed and fined, and bound to their good behavior,” etc.

¹ Per Lord Erskine in *Burdett v. Abbott*, 5 Dow, 202.

THE most trifling and ridiculous civil injuries to members of the House of Commons, even trespasses committed upon their servants, though on occasions unconnected with the discharge of any parliamentary duty, have been repeatedly the subject of inquiry under the head of privilege. But there is one instance of abuse which goes further than all the rest. A member's servant was committed as the father of a bastard: the House of Commons held he was entitled to privilege of Parliament, and a discussion ensued whether he or the constable was to pay the costs.

The instance of a citizen being committed by the House of Lords for calling the badge of a swan on a nobleman's waterman a goose, is well known.¹



“THERE is no calling witnesses without facts; there is no making a defence without innocence; there is no answering evidence which is true.”²



“ONE book,” says Phillips, “well digested, is better than ten hastily slumbered over.” — *Studii Legalis Ratio*, p. 188.

¹ Cited in the argument in *Stockdale v. Mansard*, 2 P. & D. 103.

² Lord Mansfield, arg. when Solicitor General, in the proceedings against Lord Lovat for treason, 18 Howell State Trials, 812, A.D. 1746.

“**W**HEN a learned man dies,” said the Master of the Temple, at the grave of the great juriconsult, John Selden, in 1654, in the Temple Church, — “when a learned man dies, much learning dies with him;” adding, “If learning could have kept a man alive, our brother had not died.”¹



SAT cito, si sat bene. “Quick enough, if safe enough.” This motto was a favorite maxim with Lord Eldon, who says, “In all I have had to do in future life, professional and judicial, I have always felt the effect of this early admonition, on the panels of the vehicle which conveyed me from school, ‘Sat cito, si sat bene.’”²



THE KING v. DANGERFIELD.³ The defendant was convicted of publishing a libel, wherein he had accused the King, when Duke of York, that he had hired him to kill the late King Charles, etc. And on Friday, June 20, 1685, he was brought to the bar, where he received this sentence, viz. That he should pay a fine of five hundred pounds; that he should stand twice in

¹ Wood *Athenæ Oxonienses*, vol. II. p. 134. Fol. London: 1721.

² Twiss, *Life of Lord Eldon*, vol. I. pp. 34, 35, Amer. ed.

³ 3 Mod. 68.

the pillory, and go about the Hall with a paper in his hat signifying his crime; that on Thursday next he should be whipped from Aldgate to Newgate, and on Saturday following from Newgate to Tyburn; which sentence was executed accordingly.

As he was returning in a coach on Saturday from Tyburn, one Mr. Robert Frances, a barrister of Gray's Inn, asked him in a jeering manner whether he had run his heat that day. He replied to him in scurrileous words. Whereupon Mr. Frances run him in the eye with a small cane which he had then in his hand, of which wound the said Mr. Dangerfield died on the Monday following. Mr. Frances was indicted for this murder; and, upon not guilty pleaded, was tried at the Old Bailey, and found guilty, and executed at Tyburn on Friday, July the 24th, in the same year.



A NOTEWORTHY observation fell judicially from Lord Eldon: "Upon that occasion Lord Chief Justice De Grey, in his most luminous judgment said, he never liked Equity so well as *when it was like Law*. The day before, I had heard Lord Mansfield say he never liked Law so well as when it was like Equity: remarkable sayings of these two great men, which made a strong impression on my memory." ¹

¹ Lord Dursley v. Fitzhardinge Berkeley, 6 Ves. 260.

THE following story is told as illustrative of the law's delay. When the first cargo of ice was imported into England from Norway, there not being such an article in the custom-house schedules, application was made to the Treasury and to the Board of Trade: after some delay it was decided that the ice should be entered as "*dry goods*;" but the whole load had melted before the cargo was cleared.

— • • —

TO prevent men thinking and acting for themselves by restraints on the press is like the exploit of that gallant man who thought to pound up the crows by shutting his park gate.¹

— • • —

"IF even quibbling is at any time justifiable, certainly a man may quibble for his life," said Chief Justice Parsons in a capital case.²

— • • —

WHEN Lord Eldon introduced his bill for restraining the liberty of the press, a member moved as an additional clause, that all anonymous works should have the name of the author printed on the titlepage.

¹ Milton, *Areopagitica*, ll. 11-14.

² *Commonwealth v. Hardy*, 2 Mass. 316.

THE quaint reason given by Bracton, and adopted by Lord Coke, why, by the common law, a father cannot inherit real estate by descent from his son, is, that inheritances are heavy, and descend, as it were, by the laws of gravitation, and cannot re-ascend.¹



BARON SNIGGE, with reference to the distinction between the actions of trespass and trespass on the case, thus defines the duty of the pleader: "An action of trespass lieth generally; but in an action on the case he *ought to hit the bird in the eye.*"²

"But notwithstanding, if there is an irregularity in the proceedings of the plaintiff, and the plaintiff insists upon the strict default of the defendant, as the courts of law say, it is very necessary a person insisting upon the rigor *should hit the bird in the eye.*"³



LORD BROUGHAM informs us that it was to stop Sir Samuel Romilly's menaced innovation of subjecting men's real property to the payment of all their debts that the phrase "the wisdom of our ancestors" was first used by that great Equity Judge, Sir William Grant, and by Mr. Canning

¹ Co. Litt. 11. 2 Bl. Comm. 212.

² *Levison v. Kirk*, Lane, 67.

³ Per Lord Hardwicke in *Floyd v. Nangle*, 3 Atk. 569.

“I TOLD Sir Edward Sugden,” writes Lord Campbell “(what he had not heard before) Baron Alderson’s joke,—that the collection of his decisions during his first chanceryship, which was not much longer than mine, instead of ‘Reports *tempore* Sugden,’ should be ‘Reports *momento* Sugden.’”¹



“THE Court of Chancery, while Lord Eldon held the seals, appeared to many a despairing suitor no other than John Bunyan’s renowned Doubting Castle itself.” — Goldsmith Eq. p. 53.



BONI judicis est ampliare justitiam. “The true text,” said Lord Mansfield, “is ‘boni judicis est ampliare *justitiam*,’ not ‘*jurisdictionem*,’ as it has been often cited.”²



IN May 1874, a bill to limit the privilege of franking was sent from the Parliament of Ireland for the royal approbation. It contained a clause, that any member, who from illness or other cause should be *unable to write*, might authorize another to frank for him by a *writing under his hand*.

¹ Life of Lord Campbell, vol. II. p. 231.

² Rex v. Philips, 1 Burr. 304.

IN the recently published "Life of Lord Campbell," vol. ii. pp. 184-187, is the following interesting account of the trial of O'Connell and of the subsequent proceedings in the House of Lords on the writ of error:—

"O'Connell, who had been allowed to hold meetings for repeal without check for above a twelve-month, was suddenly prosecuted under a monster indictment, containing an infinite number of counts, which charged him with an infinite variety of offences, and sought to make him personally answerable for all that had been done, written, or spoken respecting repeal for a long period of time in every part of Ireland.

"This course was most unfair and most unwise. The mode in which the prosecution was conducted was still more reprehensible. A packed jury was impanelled, from which all Roman Catholics were excluded; and the Chief Justice, Pennefather, for the purpose of obtaining a conviction, was guilty of such gross partiality, that the counsel for the Crown and the Ministers in England were scandalized, and could not say a word in his defence. Upon several of the most important counts the jury found a verdict in words which the Court in Dublin thought amounted to *Guilty*, but which were clearly an insufficient finding. On all the other counts, several of which afterwards turned out to be bad in point of law, they found a general

verdict of *Guilty*; and upon the whole record the Court, ‘for the offences aforesaid,’ passed a heavy sentence of fine and imprisonment.

“Soon after the meeting of Parliament, the Marquis of Normanby brought the subject before the House of Lords by a motion on the state of Ireland. . . . The next proceeding connected with O’Connell’s case was a bill I introduced to allow bail in error in cases of misdemeanor. I pointed out the monstrous injustice of hearing the merits of a conviction after the sentence had been carried into execution, introducing the well-known quotation:—

‘Gnossius hic Rhadamanthus habet durissima regna
Castigatque, audique dolos.’¹

“But Lyndhurst made a strong speech against the bill, and it was thrown out. In the following session he highly praised it, and it passed.

“When the writ of error came to be argued, O’Connell lying in prison in Dublin, the most intense interest was excited, and the eyes of all Europe were upon us.

“The main question was whether, there being in the indictment good counts on which there was a regular verdict of *Guilty*, the judgment sentencing the defendant to a discretionary fine and imprisonment could be supported, there being bad

¹ He first inflicts the punishment, and then he hears the writ of error.

counts in the indictment, and good counts without a regular verdict of *Guilty* upon them, the sentence purporting to be pronounced in respect of all the offences mentioned in the indictment. There was likewise a serious objection to the formation of the jury, which was raised by a plea in abatement.

“The Crown lawyers contended that we must presume that the Irish judges knew which *counts* were good, as well as which *findings* were good and which defective, so that the whole punishment awarded must be taken to be for the offences in the good counts on which there was a regular verdict of *Guilty*. This certainly would have been a presumption of law entirely against *truth*, for the Irish judges thought all the counts in the indictment good, and particularly relied upon several which all the English judges thought bad; and the Irish judges had denied that there was any insufficiency in the findings of the jury. In truth, the supposed presumption was contrary to all principle, and was unsupported by any authority; the saying that ‘it is enough if there be one good count in an indictment’ applying to a motion in arrest of judgment before sentence, and not to a writ of error after sentence.

“All the English judges, however, except two, were for overruling all the objections. The two dissentients (Parke and Coltman) thought that

the judgment ought to be reversed, as credit must be given to the averment in the record, that the punishment was awarded for *all* the supposed offences enumerated in the indictment, whereas some of these were not indictable, and of others the defendant had not been lawfully found guilty.

“Of the lay lords in the House two were now Tories, — Lyndhurst and Brougham: and three were steady Whigs, — Denman, Cottenham, and Campbell. It did so happen by some strange chance that the two were for affirming the judgment, and the three were for reversing it. We delivered written opinions. I took immense pains with mine, which may be seen in Clark and Finnelly’s Reports, vol. XI. p. 403.¹

“Were the lay lords to vote, although they had not been present at the argument of the case, and were incapable of understanding it? There were present a large number of ministerialists, who, when the question was put ‘that the judgment be reversed,’ hallooed out, ‘Not content,’ and who, if they had divided, would have constituted a large majority for *affirming*. But the Government was afraid of the effect to be produced in Ireland by an affirmance so obtained; and Lord Wharncliffe, the president of the Council, strongly advised that the lay lords should not vote. I said that the

¹ Lord Campbell’s admirable judgment on this branch of the law of Criminal Pleading has always been regarded by the profession as eminently clear and conclusive.

Constitution knew no distinction between lay lords and law lords, but that there was in reason a distinction between lords who had heard the case argued, and those who had not, and that, if any of the latter class should vote, the decision would bring great disgrace upon the administration of justice in that House. The lay lords then all withdrew; and the question being again put, we five law lords alone being in the House, Denman, Cottenham, and Campbell said, *Content*, and Lyndhurst and Brougham said, *Not content*, when, without a division, Lyndhurst said, 'The contents have it.' So the judgment was reversed, and O'Connell was liberated.¹

"Brougham immediately came up to me and said; 'Well, you have made Tindal a peer. The Government will not endure a majority of Radical law lords in the House.' Nevertheless poor Tindal died a commoner.

"I never gave a more conscientious vote. There was an awkwardness in going against a large majority of the English judges in a political case; but our judgment was generally approved of in Westminster Hall."

¹ Lord Brougham, as reported by the authorized reporters of the House of Lords, spoke of it as "a decision which will go forth without authority, and come back without respect." 41 Clark & Fennelly, p. 423. "He was actually in a furious rage," writes Lord Campbell, *Life of Lord Brougham*, p. 531.

THE following is one of the head-notes to a case reported in the second volume of Paige's Chancery Reports, p. 438: "A receiver cannot be appointed to deprive the defendant of the possession of his property, *ex parte*, without giving him an opportunity to be heard in relation to his rights, except in very special cases, as where he is out of the jurisdiction of the Court."



LORD CAMPBELL, with the prospect of being appointed Chief Justice of the Queen's Bench, under date October 14, A.D. 1849, writes:¹—

"Meanwhile I have again taken to my favorite Co. Litt. It certainly is very pleasant reading. I am more than ever struck by its unmethodical and rambling character. But one must admire the author's stupendous familiarity with all parts of the Law of England: he is uniformly perspicuous, he gives amusing glimpses of history and manners, and his etymologies and other quaint absurdities are as good for a laugh as Joe Miller or Punch.

"Littleton's book by itself is a most exquisite production. Its plan is perfect for giving a systematic outline of the law of Real Property in this kingdom in the reign of Edward IV. and all its details are most masterly. But Lord Coke's example ruined juridical composition in England.

¹ Life of Lord Campbell, II. pp. 261, 262.

Blackstone even has not been able to correct our taste ; and the repertory of Common Law learning at present most frequently referred to is the trebly annotated edition of Saunders's Reports, by Sergeant Williams, Mr. Justice Patteson, and Vaughan Williams. In law-books we are not only greatly excelled by the French and by the Scotch, but even by the Americans.

“ *October 15.* — Having been trying to find a motto for my rings when I am called Sergeant. Nothing better turns up than ‘*Justitiæ tenax.*’ — *Juv. Sat. viii. 25.*”



CARDINAL WOLSEY is, perhaps, the most notable person ever placed in the stocks. It is recorded, that at the time he was incumbent at Lymington, near Yeovil, during the village feast, he had made too free with the glass ; and the condition of the minister coming under the notice of Sir Amias Paulet, a strict moralist, he ordered him to be put in the stocks, which was accordingly done.



“ LORD CHIEF JUSTICE GIBBS used to say that he could get authorities in the Year Books for any side in any thing,” said Lord Lyndhurst, Lord Chancellor, in the course of the argument of a celebrated case in the House of Lords.¹

¹ *Gray v. The Queen*, 11 Clark & Fennelly, 441.

THE Court of Common Pleas, so late as the 5 W. & M., held that a man might have a property in a negro boy, and might bring an action of trover for him, *because negroes are heathens*.¹ "A strange principle to found a right of property upon!" exclaims Christian.²



LORD BACON, in his paper on the "Amendment of the Common Law," wrote: "Great judges are unfit persons to be reporters; for they have either too little leisure or too much authority, as may appear well by those two books, whereof that of my Lord Dyer is but a kind of note-book, and those of my Lord Coke hold too much de proprio."³



"LET one devil torment the other," said my Lord Keeper Egerton to a question asked him, what should become of the broker. Both broker and usurer had conspired to cot in a young gentleman.



IN a bill for pulling down the old Newgate in Dublin, and rebuilding it on the same spot, it was enacted that the prisoners should *remain in the old jail till the new one was completed*.

¹ 1 Ld. Raym. 147.

² 1 Bl. Comm. 425 note.

³ Bacon's Letters and Life, vol. V. p. 86, ed. Spedding.

WE suggest the following terse description of "The two Supream Laws of the Realm," found in "The Practice Unfolded" of the High Court of Chancery, p. 53, ed. 1672, to the publishers of the next edition of "Bleak House,"— "The Princes of this Land to the imitation of that heavenly representation have appointed two supreme seats of Government within this Land: the one of Justice, wherein nothing but the strict letter of the Law is observed; and the other of Mercy, which in the rigor of the Law is tempered with the sweetness of Equity, the which is nothing but Mercy qualifying the rigor of Justice."¹



IN some of the cases brought against Lord Bacon implying corruption, the sums of money received by him were not gifts at all, but money borrowed, and recoverable as debts. Three of these cases gave rise, after Bacon's death, to a curious question. Being claimed by the lenders as *debts* due to them from the estate, the executors pleaded that they had been decided by the House of Lords to be *bribes*.¹

¹ The object of the science of equity is "the amelioration of the law in that wherein by reason of its universality it is deficient." Mr. H. B. Wallace's Preface to White and Tudor's Lead. Cas. in Equity, quoted in Rawle on Equity, p. 92.

¹ Bacon, Works, XIV. 264, ed. Ellis & Spedding.

BY the Constitution of the Commonwealth of Massachusetts the office of justice of the peace is a judicial office, and must be exercised in person; and a woman, whether married or unmarried, cannot be appointed to such an office.¹

In England the Court of Common Pleas have recently decided that women are subject to a legal incapacity from voting at the election of members of Parliament; and that the word "man" in the statute is used in contradistinction to "woman." Mr. Justice Byles observed: "Women for centuries have always been considered legally incapable of voting for members of Parliament; as much so as of being themselves elected to serve as members. . . . In addition to this, we have the unanimous decision of the Scotch judges.² I trust their unanimous decision and our unanimous decision will forever exorcise and lay this ghost of a doubt, which ought never to have made its appearance."³



LORD BACON says, that "the nature of Justice distributive is to consider not only de toto, but de tanto, and not to pronounce sentence by ounces and drachms, but by grains."

¹ Opinion of the Justices, 107 Mass. 604. But she may be a member of a school committee. It is a local office of an administrative character. Opinion of the Justices, 115 Mass. 602.

² Brown v. Ingram, 7 Court of Sess. Cases, 3d ser. 281.

³ Chorlton v. Lings, L. R. 4 C. P. 374, 394, A.D. 1868.

THE Court set aside the verdict as perverse, and granted a new trial, where an Irish jury had found that a hunter was "necessary" for a mere boy, who, having bragged at a ball that he was a member of the Surrey Stag Hunt, and worth six hundred pounds a year, had induced an Irishman to sell him his horse for a hundred and fifty pounds, had hunted the animal through the season, and had then, when payment was demanded, set up, through his guardian, what was described by an indignant advocate as "the shabby defence of infancy."¹

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THE following is a terse statement of an universal rule of civil and criminal pleading: "Good matter must be pleaded in good form, in apt time, and in due order, or otherwise great advantage may be lost." — Co. Litt. 303 a.

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A WRIT of Mandamus is a high prerogative writ which has been said to be "peculiar to the Court of Queen's Bench, and one of the flowers of it,"² — a definition which throws very little light upon the question as to the occasions that will require or justify its issue.³

¹ *Skrine v. Gordon*, L. R. 9 C. L. 479.

² *Awdeley v. Joye*, Popham, 176. It has also been styled *festinum remedium*. 1 *Strange*, 546.

³ 101 *Mass.* 405.

IN ancient times in Greece, and in later times at Athens, the duty of prosecuting for murder devolved upon the relations of the murdered man ;¹ and even in England a last relic of the doctrine that homicide was a private wrong, viz. the Appeal of Murder and Wager of Battle, though long obsolete, was acknowledged by the law² until abolished by statute 59 Geo. III. ch. 46.



READERS of the entertaining work, “Boswell’s Life of Johnson,” will remember how the burly old doctor, in answer to a remark made by the celebrated Quaker lady, Mrs. Knowles, said, “Madam, we have different modes of restraining evil, — stocks for the men, a ducking-stool for women, and a pound for beasts.”



“A POPULAR judge is a deformed thing ; and *plaudite’s* are fitter for players than for magistrates. Do good to the people, love them, and give them justice. But let it be, as the Psalm saith, nihil inde expectantes ; looking for nothing, neither praise nor profit.”³

¹ Demosthenes I. 411 note, ed. Whiston.

² Ashford v. Thornton, 1 B. & A. 405, A.D. 1818.

³ Lord Bacon’s Speech in the Star Chamber, before the Summer Circuits, A.D. 1617. Letters and Life, VI. p. 211, ed. Spedding.

DURING all the time Coke's Reports were publishing, and for twenty-two years afterwards, no other Reports were printed. "It became all the rest of the lawyers to be silent whilst their oracle was speaking."¹ Sir Henry Hobart alone, his immediate successor in the Common Pleas, made a collection, which was published sixteen years after his death, and, though unskilfully edited, was commended by Sir Heneage Finch, who published a corrected edition, as "beautiful even in confusion."



THE form of judgment for punishment by the pillory was that the "defendant should be set *in* and *upon* the pillory." We find particulars of a case which occurred in 1759, when the under-sheriff of Middlesex was fined fifty pounds and imprisoned for two months, by the Court of King's Bench, because, in executing the sentence upon Dr. Shebbeare, who had been convicted of a political libel, he had allowed him to be attended upon the platform by a servant in livery, holding an umbrella over his head, and to stand without having his neck and arms confined *in* the pillory.



TO the law and to the testimony. — ISAIAH viii. 20.

¹ Preface to 5 Mod.

MR. W. H. DAWSON of the "Craven Pioneer" tells us the ducking-stool in bygone days was used in Craven. He says: "A ducking-pond existed at Kirkby, although it has not been used within the memory of any living person. Scolds of both sexes were punished by being 'ducked:' indeed, in the last observance of the custom, a tailor and his wife were 'ducked' together before the view of a large gathering of people. The husband had applied for his wife to undergo the punishment on account of her quarrelsome nature; but the magistrate decided that one was not better than the other, and he ordered a joint punishment. Back to back, therefore, husband and wife were chained, and dropped into the cold water of the pond. Whether it was in remembrance of this old observance, or not, cannot be definitely said; but it is nevertheless a fact, that in East Lancashire, in the Spring of 1880, a man who had committed some violation of morals was forcibly taken by a mob, and dragged several times through a pond until he had expressed penitence for his act."

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TRANSIT in rem judicatam. This maxim has thus been tersely rendered: "The cause of action is changed into matter of record, which is of a higher nature; and the inferior remedy is merged in the higher."¹

¹ Per Parke, B. in *King v. Hoare*, 13 M. & W. 504.

THE following anecdotes of Lord Abinger are taken from his *Life* pp. 193-195:—

“I have it on Lord Chelmsford’s authority, that the Duke of Wellington said of my father: ‘When Scarlett is addressing a jury, there are thirteen jurymen.’ This is both characteristic of the influence he exercised when addressing juries, and of the Duke’s terse manner of expressing himself.

“Mr. Justice Patteson related the following story of my father’s dexterity in the conduct of a cause; the ends of justice being attained by a theatrical display of incredulity which deceived both Brougham and Parke, the counsel on the other side. My father, with Patteson as junior counsel, was for the defendant. He told Patteson that he would manage to make Brougham produce in evidence a written instrument the withholding of which, on account of the insufficiency of the stamp, was essential for the success of his case. That on Patteson observing, that, even if he could throw Brougham off his guard, he would not be so successful with Parke, my father answered that he would try. And he then conducted the case with such consummate dexterity, pretending to disbelieve the existence of the document referred to, that Brougham and Parke resolved to produce it, not being aware that my father had any suspicion of its invalidity. Patteson described the air of extreme surprise and mortification of my father on

its production by Brougham, with a flourish of trumpets about the ‘non-existence of which document his learned friend had reckoned on so confidently.’ Patteson went on to say that the way in which my father asked to look at the instrument, and his assumed astonishment at the discovery of the insufficiency of the stamp, were a masterpiece of acting.

“On one occasion an action was brought for the abatement of a nuisance, and Mr. Scarlett was employed for the defence. He began his cross-examination of a lady, the plaintiff’s witness, by inquiring tenderly about her domestic relations, her children, their illnesses. The lady became confidential, and appeared flattered by the kind interest taken in her. The judge interfered, with a remark about the irrelevancy of this. Mr. Scarlett begged to be allowed to proceed; and on the conclusion of the cross-examination, he said: ‘My Lord, that is my ease.’ He had shown on the witness’s testimony that she had brought up a numerous and healthy progeny in the vicinity of the alleged nuisance. The jury, amused as well as convinced, gave a verdict for the defendant.

“Sir Walter Scott promised a friend that he would write a book for his benefit. The friend died before the promise was fulfilled, and his executors insisted that Sir Walter should write a book for the benefit of the widow and children of

the deceased. This Sir Walter refused to do. The executors sought the advice of Mr. Scarlett, who, having listened to their case, said: ‘Let us suppose the position to be reversed: if Sir Walter Scott had died, should you have required his executors to write a book for the benefit of your clients?’ — ‘Oh, no!’ exclaimed the executors, convinced at once that they had no case against Sir Walter Scott.”

IN an old case a man stole his wife against her friends’ consent, and sued them for her portion in the Court of Chancery, but was refused relief on the ground, as it was quaintly stated by Sir Thomas Egerton, that “he who steals flesh, let him provide bread how he can.”

BARON BRAMWELL once observed: “Every person of any experience in courts of justice knows that a scintilla of evidence against a railway company is enough to secure a verdict for the plaintiff. I was once in a case before a most able judge, the late Chief Justice Jervis, in which I was beaten, I dare say rightly, in consequence of an observation of his: ‘Nothing is so easy as to be wise after the event.’”¹

¹ *Cornman v. Eastern Counties Railway Co.* 5 Jur. N. S. 658.

THE head-note to *Blackman v. Bainton*, 15 C. B. N. S. 432, is quaint: "Twenty-five witnesses and a horse on one side against ten witnesses on the other. Held, not such a preponderance of 'inconvenience' as to induce the Court to bring back the venue from the place where the cause of action (if any) arose."



LORD BACON, in the *Advancement of Learning*, II. 20. § 8,¹ approves of condensing argument into brief and acute sentences, and gives these as examples:—

PRO VERBIS LEGIS.

Non est interpretatio, sed divinatio, quæ recedit a literâ.

Cum receditur a literâ, judex transit in legislatorem.

PRO SENTENTIA LEGIS.

Ex omnibus verbis est eliciendus sensus qui interpretatur singula.²

¹ Works, III. p. 413, ed. Ellis & Spedding.

² FOR THE WORDS OF THE LAW. — Interpretation which departs from the letter is not interpretation, but divination.

When the letter is departed from, the judge becomes the law-giver.

FOR THE INTENTION OF THE LAW. — The sense according to which each word is to be interpreted must be collected from all the words together.

DAMISELLA. A light damosel or miss. William Hoppeshort holds half a yard-land, in Bockhampton, County of Berks, of our Lord the King, by the service of keeping for the King six damsels, to wit, whores, at the cost of the King. This was called pimp-tenure.¹



EPITAPH on Sir John Strange the reporter: —

ON STRANGE, A LAWYER.

Here lies an honest lawyer, and that is *Strange*.



IN a case in which it was held that a bond in consideration of past cohabitation is good in law, Mr. Justice Bathurst “pleased the sanctionious by enriching his judgment” with quotations from the Books of Exodus (xxii. 16) and Deuteronomy (xxii. 28, 29) to prove, that “wherever it appears that the *man is the seducer*, the bond is good.”² We wonder when a case will occur in which the question of the validity of the bond, the woman being the seducer, shall be solemnly adjudged and reported.

¹ Cunningham Law Diet. sub voce, Damisella. Jacob Law Diet. sub voce, Pimp-Tenure. Blount, Tenures, pp. 29, 30, ed. Hazlitt.

² Turner, spinster v. Vaughan, 2 Wils. 339.

“LET this action,” said Lord Ellenborough, when Sir William Scott was sued for illegally excommunicating one Beaurain, whose animosity he had endeavored to stifle by a gift, — “Let this action be a lesson for all men to stand boldly forward, — to stand on their characters, — and not, by compromising a present difficulty, to accumulate imputations on their honor.”¹



CURIOUS SPECIMEN OF VIVA VOCE PLEADINGS IN THE ENGLISH COURTS IN THE REIGN OF EDWARD II.²

THE case was this: Aleyne de Newton brought his writ of annuity against the Abbot of Burton-upon-Trent, and demanded thirty pounds arrears of an annual rent of forty-five pounds, and he declared that one John, Abbot of Burton, and predecessor of the present abbot, did, by assent of the convent, grant an annuity to Aleyne, payable twice in the year, till he was advanced to a convenient benefice; and he exhibited a specialty containing that the abbot, by assent, etc., did grant an annuity to Aleyne de Newton, Clerk, in the above manner, as he had declared. Upon this, Willuby (as counsel for the defendant) prayed judgment of the writ, because of the variance be-

¹ Life of Lord Eldon by Twiss, vol. II. pp. 233-235, 2d ed.

² Reeves Hist. Eng. Law, vol. II. pp. 347-349, 3d ed.

tween the writ and the specialty ; for in the writ he was named Aleyne de Newton, but in the specialty Aleyne de Newton, Clerk. Ward said that it was no variance ; yet Willuby maintained, that as he might have a writ agreeable to the specialty, if he varied in his own purchase of it, the writ would be ill ; but he could in this case have a writ agreeable to his specialty. Ergo, etc. And again, as far as appeared by the specialty, it was made to some one else, and not to the person named in the writ. Stonore, one of the justices, said : “ Then you may plead so if you will : but the writ is good : ” therefore respondeas ouster.

“ Then,” said Willuby, “ he cannot demand this annuity, because we say that John, our predecessor, on such a day, etc., tendered him the vicarage of, etc., which was void, and in his gift, in the presence of such and such persons, which vicarage he refused : wherefore we do not understand that he can any longer demand this annuity.” SHARD. — “ We say this vicarage was not worth one hundred shillings : therefore we do not understand it to be a *convenable* benefice, so as to extinguish an annuity of forty pounds.” WILLUBY. — “ Then you admit that we tendered you the vicarage, and that you refused it ? ” etc. SHARD. — “ As to the tender of a benefice which was not *convenable*, I have no business to make

any answer at all." Then Mutford, one of the justices, asked what sort of benefice they considered as *convenable*, so as to extinguish the annuity. SHARD. — "We mean one of ten marks at least." Then Stonore said: "Do you admit that the vicarage was not worth one hundred shillings?" WILLUBY. — "We will aver that the vicarage was worth ten marks, prest, etc.; and he has admitted that one of that value should extinguish the annuity." SHARD. — "And we will aver that it was not worth ten marks, *prest*," etc.

After this issue, Willuby was desirous of recurring back to his first plea, and said: "As you declare that the vicarage was not worth one hundred shillings, we will aver that it was worth one hundred shillings," etc. But Stonore interposed, and said: "He declares that the vicarage is worth ten marks; and after that there is nothing to be done, but that the issue should be taken on your declaration or his: now, it seems that it should rather be on yours, for by your plea you make that a *convenable* benefice which is worth ten marks, and such a declaration you ought to maintain," etc. WILLUBY. — "Then, mention of the value came first from him, when he said it was not worth one hundred shillings; so that it will be sufficient for me to traverse what he had said." But, Stonore pressing him whether he would maintain his plea, Willuby said he would, and accord-

ingly pleaded that the vicarage was worth ten marks, *prest, etc. et alii*, that it was not worth ten marks, *prest, etc.* and so issue was joined.

The pleadings upon the record in the above case must then have stood thus: The defendant said a vicarage had been tendered and refused, and so the annuity should cease, judgment of the action. To this the replication was: The vicarage tendered was not worth ten marks, and so not a convenable benefice to extinguish the annuity: rejoinder, it was worth ten marks: surrejoinder, it was not.

This instance will serve to show the manner of pleading *viva voce* at the bar: every thing there advanced was treated as a matter only in fieri, which upon discussion and consideration might be amended, or wholly abandoned, and then other matter resorted to, till at length the counsel felt himself on such grounds as he could trust. Where he finally rested his cause, that was the plea which was entered upon the roll, and abideth the judgment of an inquest, or of the Court, according as it was a point of law or of fact.



THE Irish statute-book opens characteristically with: "An Act that the King's officers may travel *by sea* from one place to another within *the land* of Ireland."

ON the removal of a distinguished counsel from a house in Red Lion Square, an ironmonger became its occupant; and Erskine wrote the following epigram on the change:—

“This house, where once a lawyer dwelt,
Is now a smith’s — alas!
How rapidly the iron age
Succeeds the age of brass!”



SYDNEY SMITH, doubting the practicability of introducing trial by jury into New South Wales, imagines a few of the excuses that might be made by any one summoned as a juror. “I cannot come to serve upon the jury: the waters of the Hawksbury are out, and I have a mile to swim. The kangaroos will break into my corn. The convicts have robbed me. My little boy has been bitten by an *ornithorynchus paradoxus*. I have sent a man fifty miles with a sack of flour to buy a pair of breeches for the assizes, and he is not returned.”



IN the well-known case of *Emans v. Turnbull*, 2 Johns. 313, Chief Justice Kent delivered the opinion. In a very recent case in Ireland, Chief Justice May, citing this case, says: “The *Lord Chancellor Kent* in giving judgment,” etc.¹

¹ *Brew v. Haren*, 11 C. L. 217, in Exch. Cham. A.D. 1877.

THE following are specimens of Greek wit:—

Philip, in passing sentence on two rogues, ordered one of them to leave Macedonia with all speed, and the other to try and catch him.

Demonax was once heard to say to a lawyer, "Probably all laws are really useless; for good men do not want laws at all, and bad men are made no better by them."

Alcibiades, when about to be tried by his countrymen on a capital charge, absconded, remarking that it was absurd, when a suit lay against a man, to seek to get off, when he might as easily get away.

Socrates used to say the best form of government was that in which the people obey the rulers, and the rulers obey the laws.

It was a saying of Cato the Elder, "Those magistrates who can prevent crime, and do not, in effect encourage it."

Cicero, when one Nepos told him he had caused the death of more by his testimony than he had ever saved by his advocacy, replied, "That is because my credit exceeds my eloquence."



DOUGLAS JERROLD says, "Truth is like gold: a really wise man makes a little of it go a long way."

“**A**UTHORITIES are the actual decisions of the courts.”¹

“The law is made up of decided cases.”²

“Decisions of the Courts of Common Law are at one the best expositors and the surest evidence of the common law itself.”³

“A matter is properly said be adjudged when there can be no appeal.”⁴



IN a case in the time of Elizabeth, the plaintiff, for putting in a long replication, was fined ten pounds, and imprisoned, and a hole to be made through the replication, and to go from bar to bar with it hung round his neck.⁵



IF one be in execution, and if he has no goods, he shall live of the charity of others; and if others will give him nothing, let him die in the name of God.”⁶

¹ Pollock, C. B. in *Dyer v. Best*, 35 L. J. Exch. 107. A chain of authorities Milton calls “a paroxysm of citations.”

² Lord Lyndhurst, L. C. in *Lewis v. Bridgman*, 2 Clark & Finnelly, 747.

³ Tindal, C. J. in *The Queen v. Millis*, 10 Clark & Finnelly, 657.

⁴ Jenkins, Cent. Preface.

⁵ *Milward v. Welden*, Tothill, 101.

⁶ Montague, Chief Justice, in *Dive v. Mannington*, 1 Plowd. 68, quoted in *McLain v. Hayne*, 1 Brevard, 296.

IN Mr. Goldwin Smith's sketch of Pitt, it is related that Lord Eldon, at that time Attorney General Sir John Scott, "opened his attempt to procure the capital conviction of a man who he knew had done nothing worthy of death with a pathetic exordium on his own disinterestedness and virtue. He should have nothing to leave his children but his good name; and then he wept. The Solicitor General wept with his weeping chief. 'What is the Solicitor weeping for?' said one bystander to another. 'He is weeping to think how very little the Attorney will have to leave his children.'"¹



NEMO ex proprio dolo consequitur actionem. It is a maxim of law that "a man shall not take advantage of his own wrong." The principle is as old as the time of Demosthenes. In the Oration against Leochares, he says: "It can never be just to regard a wrongful act as evidence for a party."



A N indictment charging that the defendant *forged* a certain writing obligatory by which A is *bound*, is void for its manifest inconsistency and repugnancy. The Court: "That is a wheel in a wheel, and can never be made good."²

¹ The North American Review, vol. CXIV. p. 78.

² The King v. Neck, 2 Show. 472.

A WRIT de ventre inspiciendo, returnable Tres Mich. on the behalf of Edward Ascough, Esq. and Elizabeth his wife, Anne Chaplin, spinster, Charles Fitzwilliams, and Frances his wife, co-heirs of Sir John Chaplin, Bart., their brother, against dame Elizabeth Chaplin, widow of the said Sir John. The writ was returned that the lady was with child, and a motion made for the safe custody of her until her delivery. It was suggested that the lady's mother was likewise with child, and therefore neither she nor any other woman with child were proper persons to be with her. The Court agreed that such a clause should be inserted in the writ; and ladies were named on the part of the prosecutors or heiresses to attend the lady during her pregnancy and till her delivery; but they must not name any spinster, and the mother was allowed to visit only.¹



IN Kelyng's Reports is this passage: "At the Lent Assizes for Winchester, 18 Car. II. the clerk appointed by the bishop to give clergy to the prisoners, being to give it to an old thief, I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the

¹ Ascough v. Lady Chaplin, Cooke 93, 3d ed.; S. C. 2 P. Wms. 591; 2 Eq. Cas. Ab. 780; Mosely, 391, A.D. 1730.

prisoner never looked upon the book at all, and yet the bishop's clerk, upon the demand of *legit*, or *non legit*, answered *legit*; and thereupon I wished him to consider, and told him I doubted he was mistaken, and bid the clerk of the assizes ask him again, *legit*, or *non legit*, and he answered again, something angrily, *legit*. Then I bid the clerk of the assizes not to record it; and I told the parson he was not the judge whether he read or no, but a ministerial officer, to make a true report to the Court. And so I caused the prisoner to be brought near, and delivered him the book, and then the prisoner confessed he could not read; whereupon I told the parson he had reproached his function, and unpreached more that day than he could preach up again in many days; and because it was his personal offence and misdemeanor, I fined him five marks, and did not fine the bishop, as in case he had failed to provide an ordinary."¹



DISCRETION is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colorable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *Talis discretio discretionem confundit*.²

¹ Kel. 51; 82, 3d ed.

² *Rooke's Case*, 5 Rep. 100 a.

ONE of the most remarkable of the curiosities in the "books of Reports" is the case of *Babcock v. Montgomery County Mut. Ins. Co.* 4 N. Y. 326. The case decides that where a building was insured generally against loss by fire, and in a separate clause in the policy the insurers were declared liable for fire by lightning, no liability attaches for a loss occasioned by the building being struck by lightning, prostrated, and destroyed, but no ignition or combustion taking place. The extent and variety of the allusions in the opinion to the subject under discussion are certainly unique. The point was to determine whether "lightning" is "fire," the plaintiff contending that destruction by lightning in any manner is a destruction by fire. Mr. Justice Hurlbut alludes to three passages in the Bible, of which the passage from Job i. 16 is the most noteworthy: "The fire of God is fallen from heaven, and hath burned up the sheep and the servants, and consumed them." Allusions are made to the doctrines of Seneca, the Stoics, and Epicureans. Quotations are made from Milton's "*Paradise Lost*," and from Byron's "*Childe Harold*." The scientific treatises are examined: and the names of Descartes, Harris, Dr. Lardner, Franklin, Faraday, and Metcalf, appear in the discussion. A few law cases are cited; and the judge comes to the conclusion that "Electricity, caloric, or heat may so act, without produ-

cing fire, as to cause great injuries to property; but these are not embraced by an insurance against fire alone."



IN the great case, *Bartonshill Coal Company v. Reid and McGuire*,¹ who were both killed in the working of a mine by the negligence of a fellow-servant employed in the same common work, the reporter quaintly observes: "Reid and McGuire were both victims of the same accident, which, though melancholy, has settled the law," — doubtless a great satisfaction to the public, if not to Reid and McGuire.



"THE last time I opened Statham's Abridgment," says Fuller, "I lighted on this passage: '*Molendinarius de Matlock tollavit bis, cō quod ipse audivit Rectorem de eādē villā dicere in Dominicā Ram. Palm. Tolle, tolle.*'"² 'The miller of Matlock took toll twice, because he heard the rector of the parish read on Palm Sunday, *Tolle, i.e., crucify him, crucify him.*'"³ But if this be the fruit of Latin service, to encourage men in felony, let ours be read in plain English."⁴

¹ 3 Macqueen, 266, 301 note. Quoted in *Gilman v. Eastern Railroad Corporation*, 10 Allen, p. 237.

² Statham, *Tit. Toll.*, last case of the Title.

³ The Gospel appointed for the day.

⁴ *Worthies, Derbyshire*, vol. 1. p. 256, ed. 1811.

MR. DUNNING, afterwards Lord Ashburton, was stating the law to a jury at Guildhall, when Lord Mansfield interrupted him by saying, "If *that* be law, I'll go home and burn my books." — "My Lord" replied Dunning, "you had better go home and read them."



IF once a man indulges himself in murder, very soon he comes to think little of robbing; and from robbing he comes next to drinking and Sabbath-breaking, and from that to incivility and procrastination. Once begin upon this downward path, you never know where you are to stop. Many a man has dated his ruin from some murder or other that perhaps he thought little of at the time. — *De Quincey*.



IN a recent case, in which the indictment "surpassed in vagueness and uncertainty any precedent to be found in the books," Mr. Justice Fitzgerald observed: "A practice has recently prevailed of shaping indictments in so very general a form as to cast the smallest burden of proof on the prosecutor, in that they may be all right, but the prosecutor has, in the present instance, finessed too much."¹

¹ White v. The Queen, I. R. 10 C. L. 536.

IT was decided, so early as the reign of Henry V. that a contract imposing a general restraint on trade is void. Indeed, Hull, J. flew into a passion at the very sight of a bond imposing such a condition, and exclaimed, with more fervor than decency, “A ma intent vous purres aver demurre sur luy que l’obligation est voide eo que le condition est encounter common ley, *et per Dieu, si le plaintiff fuit icy, il irra al prison tanque il ust fait fine au Roy.*”¹



“IT has been said that circumstantial evidence is to be considered as a *chain*, and each piece of evidence as a link in the chain; but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.”²



SCROGGS, CHIEF JUSTICE. — “As anger does not become a judge, so neither doth pity for one is the mark of a foolish woman, as the other is of a passionate man.”³

¹ Year Book, 2 Henry V. 5, 26, cited in 11 Rep. 16, and in the Note to *Mitchel v. Reynolds*, 1 Smith L. C. 432, 7th London ed.

² Per Pollock, C. B. in *Regina v. Exall*, 4 Foster & Finlason, 929.

³ *The King v. Johnson*, 2 Show. 4.

SIR WILLIAM BLACKSTONE, wrote that accomplished scholar, Malone, as Sir William Scott of the Commons observed to me a few days ago, was extremely irritable. He was the only man, my informant said, he had ever known who acknowledged and lamented his bad temper. He was an accomplished man in very various departments of science, with a store of general knowledge. He was particularly fond of architecture, and had written upon that subject. The notes which he gave me on Shakespeare show him to have been a man of excellent taste and accuracy, and a good critic. The total sum which he made by his "Commentaries," including the profits of his Lectures, the sale of the books while he kept the copyright in his own hands, and the final sale of the proprietorship to Mr. Cadell, amounted to fourteen thousand pounds. Probably the bookseller in twenty years from the time of that sale will clear ten thousand pounds by his bargain, and the book prove to be an estate to his heirs.

Blackstone made six hundred pounds a year by his professorship and Lectures, which, however, he thought it wise to relinquish for the chance of succeeding in Westminster Hall. Not having acquired a facility of expression, nor promptness of applying his law by early practice, he was always an embarrassed advocate. There were more new trials granted in causes which came

before him on circuit than were granted on the decisions of any other judge who sat at Westminster in his time. The reason was, that, being extremely diffident of his opinion, he never supported it with much warmth or pertinacity in the court above, if a new trial was moved for. With the little failings already mentioned, he was one of the finest writers and most profound lawyers that England has produced, considering law merely as a science. He was also a strictly conscientious, honest man. In his "Commentaries" he was much indebted to Hall, and Wood (particularly the latter) for the method and arrangement he has observed; but the perspicuity, the vigor, the luminous statement, the elegant illustration, and the classical grace by which his "Commentaries" are so eminently distinguished, were all his own.¹



A TEDIOUS preacher had preached the assize sermon before Lord Yelverton. He came down, smiling, to his lordship, after the service, and, expecting congratulations on his effort, asked, "Well, my lord, how did you like the sermon?" — "Oh! most wonderfully," replied Yelverton. "It was like the peace of God: it passed all understanding, and, like his mercy, I thought it would have endured forever."

¹ Maloniana, from Prior's Life of Malone, p. 431.

THE famous judgment of Sancho Panza, acquitting the herdsman charged with rape, was founded on the ascertained fact that the prosecutrix successfully resisted the attempt to take her purse, which the accused made by order of the Court. "Sister of mine," said honest Sancho to the forceful but not forced damsel, "had you shown the same, or but half as much, courage and resolution in defending your chastity as you have shown in defending your money, the strength of Hercules could not have violated you."¹



TWO men had been convicted at Chester of the most atrocious murder of a magistrate; but a dispute arose whether the sentence against them was to be carried into effect by the sheriff of the county of Chester, or by the sheriffs of the city of Chester. All the functionaries refusing to act, years might elapse before this dispute could be legally determined; and till then the murderers could not be made to expiate their offence under the sentence originally pronounced against them. There was a great outcry by reason of the law being thus defeated. Lord Campbell, then Attorney General, boldly brought the convicts to the bar of the King's Bench, and prayed that execu-

¹ Don Quixote, part 2, book 3, ch. 13, quoted in 1 Taylor Ev. § 215, 7th ed.

tion should be awarded against them by the judges of that court. After a demurrer and long argument, they were ordered to be executed by the marshal of the King's Bench, at Saint Thomas-a-Waterings in the borough of Southwark, aided by the sheriff of Surrey, — a form of proceeding which had not been resorted to for many ages. The execution took place accordingly, amidst an immense assemblage, not only from the metropolis, but from remote parts of the kingdom.¹

—♦♦—

AT a club dinner of artists a barrister present, having his health drunk in connection with the law, began an embarrassed answer by saying that he did not see how the law could be considered one of the arts. Jerrold quickly jerked in the word *black*, and sent the company into convulsions.

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FOR modern law, Sergeant Hill had supreme contempt; and I have heard him observe that the greatest service that could be rendered the country would be to repeal all the statutes, and burn all the Reports which were of a later date than the Revolution.²

¹ Rex v. Garside and Mosley, 2 A. & E. 266. Life of Lord Campbell, vol. II pp. 58, 59.

² Remilly, Memoirs, vol. I. p. 72.

IN the case of *Dolan v. Kavanagh*, I. R. 10 C. L. 166, the defendant was convicted for having exposed goods for sale outside his shop in a street in the city ; but the place where they were so exposed was part of the premises of the defendant, over which the public had no right to pass. It was held that the defendant was guilty of an offence within the 5 Viet. ch. 24, § 17. The following is the judgment of Dowse, B. :—

~ In this case the facts are beyond dispute. A private dwelling-house has been converted into a shop. The area has been covered over, and the iron railings next the street removed ; the railing at right angles to the house has been left standing. On this covered area, flagged over and raised a little above the footpath proper, goods have been exposed for sale. The police, who are afflicted with fits of periodical activity, have summoned the defendant for an offence under the 5 Viet. ch. 24, § 17. That section in effect enacts that any person, who in any street or public place exposes for sale any thing on the outside of his house or shop, shall be subject to the penalty mentioned in this section. Can any one doubt that the place where these goods were exposed for sale was in a street ? It is said that the covered area formed no portion of the footpath, and was never dedicated to the use of the public : that it was in fact part of the defendant's premises.

That may be ; it is not the less in a street on that account. In one sense the street means the roadway and footpath ; in another sense it has a more extended meaning. The house itself is in Talbot Street. The defendant lives in that street, yet he does not take up his abode in the roadway or on the footpath. Giving a reasonable construction to this statute, no one can doubt that these goods were exposed for sale in a street. If the steps of a hall-door are in the street, this place is in the street : and in my opinion it would be an abuse of terms to use the word 'street' in a sense that would exclude the flagging in front of a house from the operation of the section. It is possible to suggest cases where the flagging in front of a house would not be in a street, though the house itself may face a public thoroughfare. When these cases come before us, we shall be able to deal with them. The only remaining question is, Were these goods exposed for sale on the outside of the shop ? It is here that the poetical imagination of the counsel for the defendant has run riot. He says this place is not on the outside of the shop. Where is it, then ? Is it in the inside of the shop ? He says it is ; and it is so because he builds an imaginary wall from the extreme edge of the covered space, which is all the defendant's own ground, up to the sky, and when this wall is built, he says it is the outside wall of the shop, and

the goods are not then exposed on the outside of the shop. When this wall is built of stone, or brick, or timber, or any other substance of a tangible kind, there will be no exposure for sale on the street, and that which was outside will become inside ; but, until that is done, I decline to construct a non-existent wall, and to construe an Act of Parliament by giving to 'airy nothings a local habitation and a name.' When 'Snout, the tinker' represented a wall, he brought with him some rough-cast and stone ; we are to be more fantastic than the 'Midsummer Night's Dream,' and to build a wall without even the smallest thread of gossamer to assist us. If we build the wall, how long is it to endure ? Till this case is over ; and then, in this at least resembling the wall of the poet, it will say : —

‘Thus have I, wall, my part dischargèd so ;
And, being done, thus wall away doth go.’

‘I will be no party to this castle-building in the air. If the person convicted here wants an unsubstantial wall, let him have unsubstantial hams and bacon exposed for sale. If he gives merely a Barnecide feast to his customers congregated on the footpath, he need never fear the penalties contained in that very prosaic statute entitled *An Act for Improving the Dublin Police*. I can see no difficulty in this case. If I give loose reins to my

imagination, I do not know where I can stop. If inclined to be poetical, the last subject I shall choose for my muse will be any thing connected with the streets of Dublin."



IN the celebrated judgment of Lord Denman in *O'Connell v. The Queen*, is this passage: "If it is possible that such a practice as that which has taken place in the present instance should be allowed to pass without a remedy, trial by jury itself, instead of being a security to persons who are accused, will be *a delusion, a mockery, and a snare.*"¹



NOBODY was more bitterly witty than Lord Ellenborough. A young lawyer, trembling with fear, rose to make his first speech, and began, "My Lord, my unfortunate client — my Lord, my unfortunate client — my Lord —" — "Go on, sir, go on," said Lord Ellenborough: "as far as you have proceeded hitherto, the Court is entirely with you."

¹ 11 Clark & Fennelly, at p. 351. Mr. Justice Denman adds a curious circumstance. Walking down with his father from the House after the delivery of the judgment, and praising, among other things, the celebrated words, "a mockery, a delusion, and a snare," "Ah," said Lord Denman, "I am sorry I used those words: they were not judicial." — *Memoir of Lord Denman*, vol. II. p. 183 note.

WITH respect to *children*, no precise age is fixed by law within which they are absolutely excluded from giving evidence, on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind much must ever depend upon the good sense and discretion of the judge.

The utter want of discretion in dealing with this subject, which has sometimes been evinced by the inferior functionaries of the law, is admirably ridiculed by Mr. Dickens, in his “Bleak House.” A little crossing-sweeper being brought up before a coroner to give evidence on an inquest, the narrative thus proceeds: “Name Jo. Nothing else that he knows on. . . . Knows a broom’s a broom, and knows it’s wicked to tell a lie. Don’t recollect who told him about the broom, or about the lie, but knows both. Can’t exactly say what’ll be done to him arter he’s dead if he tells a lie to the gentleman, but believes it’ll be something very bad to punish him, and sarve him right; and so he’ll tell the truth.”—‘This won’t do, gentlemen,’ says the coroner, with a melancholy shake of the head. ‘Don’t you think you can receive his evidence, sir?’ asks an attentive jurymen. ‘Out of the question,’ says the coroner. ‘You

have heard the boy: *can't exactly say* won't do, you know. We can't take that in a court of justice, gentlemen. It's *terrible depravity*. Put the boy aside.' Boy put aside to the great edification of the audience, especially of little Swills the comic vocalist."



"IF a man robs his fellow-traveller, and is indicted for so doing, the allegation that he became the companion of his victim with a pre-conceived design to rob him is wholly immaterial."¹



IN the case of Prohibitions Del Roy, 12 Rep. 64, 65, is this passage: "A controversy of land between parties was heard by the King, and sentence given, which was repealed for this, that it did belong to the common law. Then the King said that he thought the law was founded upon reason, and that he and others had reason as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England; and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law.

¹ Moxon v. Payne, L. R. 8 Ch. 881, per James, L. J.

which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace: with which the King was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege.* Bract. 74.”



“IF we see one against whom there is a judgment of this court walk in Westminster Hall, we may send our officer to take him up, if the plaintiff desire it, without a writ of execution.” — Per Holt, Chief Justice.¹



IN *NASH v. BATTERSBY*, 2 Ld. Raym. 986 and 6 Mod. 80, the plaintiff declared with the addition of gentleman. The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurred, and it was ill; for, said the Court, it amounts to a confession that the plaintiff is no gentleman, and then not the person named in the count. He should have replied that he is a gentleman.

¹ 7 Mod. 52.

BROUGHAM, speaking of the salary attached to a new judgeship, said it was all moonshine. "Maybe," said Lord Lyndhurst; "but I've a notion, that, moonshine or not, you would like to see the first quarter of it."

"WE easily believe what we wish to be true," said Mr. Justice Grier in a charge to a jury. "We are prone to be satisfied with light proof, or any fallacy, in favor of a preconceived opinion, prejudice, or feeling. When we suffer ourselves to be thus tempted, we act as tyrants, not as judges. In the midst of our virtuous indignation against crime, we first assume it has been committed, and then seek for arguments to confirm, not our judgments, but our prejudice. 'Trifles light as air' then become 'strong as proofs of holy writ.' Circumstances which to an unprejudiced mind are just as compatible with innocence as guilt, which at best could only raise a suspicion, are set down as conclusive evidence of crime. Those who sit in judgment over men's rights, whether as courts or jurors, should beware of this natural weakness to which we are almost all of us subject."¹

"The human understanding," wrote Lord Bacon,

¹ *Turner v. Hand*, 3 Wallace, Jr. 112. The entire charge is particularly fine.

“when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself), draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects: prejudging the matter to a great and pernicious extent in order that the authority of its former conclusions may remain inviolate.”¹

...

THE rule which requires a day to be specified, but does not require that day to be proved, appears to rest on much the same foundation as the argument used by Corporal Trim in telling his unfortunate story of the King of Bohemia. “There was a certain king of Bohemia, but in what year of our Lord,” — “I would not give a halfpenny to know,” said my Uncle Toby. “*Only, an’ please your Honor, it makes a story look the better in the face.*” My Uncle Toby’s reply, “Leave out the date entirely, Trim, a story passes very well without these niceties, unless one is pretty sure of ‘em,” is founded on good sense. Either allege a date, and prove it, or omit it altogether.

¹ *Novum Organum*, Aph. XLVI., Works, vol. IV. p. 56, ed. Ellis & Spedding.

IN the case of *Musselman v. Musselman*, in the *Indiana Reports*, vol. 44, p. 107, A.D. 1873, we find among others the two following head-notes:—

“Where it does not appear, on appeal, how snoring in court by the judge and attorneys prevented a party from having a fair trial, and the party assigning such conduct as a ground for a new trial does not appear to have objected to it, there is nothing for the Supreme Court to consider in relation to such conduct.”

“The assignment as a reason for a new trial, ‘that the Court erred in sleeping, or sitting with his eyes closed, during the reading of the written evidence on the part of the plaintiff at the trial of the cause,’ is too vague and indefinite. If the judge were asleep, the party should have ceased reading, or awakened him; if he sat merely with his eyes closed, it is presumed he did so to hear the more acutely.”

- . . . -

THERE have been many eulogies on trial by jury; but this spoken by Sir James Mackintosh, in his defence of Jean Peltier, charged with a libel on Bonaparte, First Consul, is probably unsurpassed in beauty: “He now comes before you, perfectly satisfied that an English jury is the most refreshing prospect that the eye of accused innocence ever met in a human tribunal.”¹

¹ Mackintosh's *Miscellaneous Works*, vol. III. p. 215.

THE rule excluding hearsay evidence, or rather the mode in which that rule is frequently misunderstood in courts of justice, is amusingly caricatured by Mr. Dickens, in his report of the case of *Bardell v. Pickwick*:—

“‘I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up, if you please, Mr. Weller.’

“‘I mean to speak up, sir,’ replied Sam. ‘I am in the service o’ that ’ere gen’tman, and werry good service it is.’

“‘Little to do, and plenty to get, I suppose?’ said Sergeant Buzfuz with jocularly.

“‘Oh! quite enough to get, sir, as the soldier said ven they ordered him three hundred and fifty lashes,’ replied Sam.

“‘*You must not tell us what the soldier, or any other man said, sir,*’ interposed the judge, ‘*it’s not evidence.*’

“‘Werry good, my lord,’ replied Sam.”



A STORY is told of one Smith who was made a police magistrate. He was a pompous, stupid man, very attentive to forms, but frequently ignorant how to apply them. The very first day he sat in his public capacity he made a blunder that stuck by him ever after. A man was brought up before him for picking pockets. Mr. Smith

seemed to have reflected deeply, and prepared a speech, of which he was anxious to deliver himself. He heard the case, therefore, with all the solemnity of a trial for murder. He listened with the profoundest attention to all the evidence, and then, taking a three-cornered hat in his hand, he thus addressed the prisoner with the utmost gravity: "Thomas Styles, you have been found guilty, on the clearest evidence, of the abominable crime of picking pockets. The testimony of the witnesses has been clear and satisfactory, and no doubt of your heinous guilt remains. It now only remains for me to pass the dreadful sentence of the law. The sentence of the Court on you is, that you be taken hence to the prison at Cold Bath Fields; that you be there confined for the space of one month, be once privately whipped before you quit it; and (putting on the hat, and looking at the prisoner with the most sorrowful solemnity) *God have mercy on your wretched soul!*"



IN the time of Henry VI. it seems not to have been a settled point whether an action might be maintained against an innkeeper for refusing a lodging; and it appears to have been the better opinion, that the proper remedy was to complain to the ruler of the vill, or the constables of the place.¹

¹ Year Book, 39 Hen. VI. p. 18. 5 Edw. IV. p. 2.

WHEN the proceedings have been entered upon record, the common law power of amendment ceases; for the judges at common law were prohibited from allowing alterations to be made in any record: and indeed several of them were, during the reign of Edward the First, severely punished for so doing, among whom the Lord Chief Justice Hengham was fined, according to some, seven thousand, to others, eight hundred, marks, which sum, as we are told by Justice Southcote,¹ was expended in building a clock-house at Westminster, with a clock to be heard in the Hall,—a circumstance which, as is observed by Mr. Justice Coleridge, in his admirable edition of Blackstone's Commentaries, explains a dictum of Lord Holt,² where his lordship, refusing to amend a record, said, "He considered there wanted a clock-house over against the Hall-gate."³



A LATE venerable practitioner in a humble department of the law, who wanted to write a book, and was recommended to try his hand at a translation of Latin law-maxims as a thing much wanted, was considerably puzzled with the maxim, "Catella realis non potest legari;" nor was he quite relieved when he turned up his Ainsworth,

¹ 3 Inst. 72. ⁴ Inst. 255. ² Anon. 6 Mod. 130.

³ Note to Robinson v. Raley, 1 Smith L. C. 248, 2d London ed.

and found that *catella* means "a little puppy." There was nothing for it, however, but obedience, so that he had to give currency to the remarkable principle of law that "a genuine little whelp cannot be left in legacy." He also translated "*messis sequitur sementem*," with a fine simplicity, into "the harvest follows the seedtime;" and "*actor sequitur forum rei*" he made, "the agent must be in court when the case is going on." Copies of the book containing these gems are exceedingly rare, some malicious person having put the author up to their absurdity.



THERE are two old methods of paying rent in Scotland, — *Kane* and *Carriages*: the one being rent in kind from the farmyard, the other being an obligation to furnish the landlord with a certain amount of carriage, or rather, cartage. In one of the vexed cases of domicile which had found its way into the House of Lords, a Scotch lawyer argued that a landed gentleman had shown his determination to abandon his residence in Scotland by having given up his "*kane and carriages*." It is said that the argument went further than he expected, the English lawyers admitting that it was indeed very strong evidence of an intended change of domicile when the laird not only ceased to keep a carriage, but actually divested himself of his walking-cane.

WHEN it was proposed in Parliament to increase the judges' salaries, and the motion was carried by one hundred and sixty-nine to thirty-nine, Charles Townshend said that "the Book of Judges had been saved by the Book of Numbers."



THIS passage occurs in Sir Vicary Gibbs's¹ argument in the Banbury Peerage:²—

"Age may not be proof of impotency, but it is evidence of it. The probability of the Earl's begetting a child at eighty is very slight, and it is not increased by the appearance of another child two years later. Instances have been adduced of these extraordinary births: but none have been cited in which a man at eighty-two, having begotten a son, had concealed the birth of such son. Would not he seek publication rather than concealment? Besides, at the birth of children in families of distinction, it is generally an object of much anxiety to have the event authenticated. Some registry is made of it. None has been found here after the most diligent search. If the register is lost, the date may always be supplied by the banquets and festivities with which it is contemporaneous. Why, the whole county would have

¹ At the time Attorney General.

² Reported in an Appendix to *Le Marchant's Gardner's Peerage*, 427, 428.

resounded with the ringing of bells! You would have had processions of old men upon the anniversary of such a prodigy. It would have excited as much surprise as if a mule had been brought to bed! It reminds me of the lines of Juvenal:—

Ergonium sanctumque virum si cerno, bimembri
Hoc monstrum puero, vel mirandis sub aratro
Piscibus inventis, et fetæ comparo mulæ.

Sat. XIII 65.

“In no register, in no will, in no document, is there any notice of this wonderful production. And then, not content with one, the miracle must be multiplied. It was not enough that one child should be born to a man at eighty-two: he must have another when he was eighty-four. And Nature consummated her prodigality by lavishing on these children the strength and vigor which she usually denies to the offspring of imbecility.”

—•••—

IN a case in the Court of Queen's Bench, a plaintiff, as soon as he had discovered the fact, applied to set aside a judgment in his own favor, on the ground of a mistake having been made by himself in the amount claimed and recovered, although the debt and costs had been actually paid by the defendants. The Court, in furtherance of justice, allowed him to do so.¹

¹ Cannon v. Reynolds, 5 E. & B. p. 301.

KELYNG reports a mode of dealing with a prisoner who refused to plead, by tying his two thumbs together with whipcord, "that the pain of that might compel him to plead." He says that this was the "constant practice at Newgate." In the particular case reported, the whipcord, with the aid of a parson, produced the desired effect in an hour.¹



IN delivering the judgment of the Privy Council in a recent case,² Sir John Taylor Coleridge thus eloquently discoursed of the advantages of the *viva voce* examination of witnesses: "The most careful notes often fail to convey the evidence fully in some of its most important elements, — those for which the open oral examination of the witnesses in presence of prisoner, judge, and jury, is so justly prized. It cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of any thing of particular moment. It is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied, when given openly and orally, by the ear and eye of those who receive it."

¹ Kel. 27; 34, 3d ed.

² Regina v. Bertrand, L. R. 1 P. C. 535; S. C. 10 Cox C. C. 625.

A PEER was once branded by *mistake*. Sir Matthew Hale writes: "A great lawyer hath been much blamed for burning a peer on the hand, that confessed an indictment for manslaughter; and it was the only error of note that that person erred in to my observation."



QUI hæret in litera hæret in cortice is a familiar maxim in the law. "The letter killeth, but the spirit maketh alive," is the more forcible expression of Scripture.¹



A STORY is told of a house seeming irretrievably on fire, until the flames, coming in contact with the folio Corpus Juris and the Statutes at Large, were quite unable to get over this joint barrier, and sank defeated.



LORD ELLENBOROUGH showing some impatience at a barrister's speech, the gentleman paused and said: "Is it the pleasure of the Court that I should proceed with my statement?" — "Pleasure, sir, has been out of the question for a long time: but you may proceed."

¹ Per Parker, C. J. in *Henshaw v. Foster*, 9 Pick. 317. "The letter killeth, but the spirit giveth life." — 2 Cor. iii. 6.

MR. JUSTICE WELLS, in charging the jury in a capital case, in defining what is a reasonable doubt, once said: "A man might so cultivate a doubt as not to be able to believe any thing; yet such a doubt was not a reasonable one."



IN the case of *Ryves v. The Attorney General*, which attracted so much notice a few years since, where Mrs. Ryves attempted to establish her claim to royal lineage, this occurrence is reported: "Dr. Smith then proceeded to address the jury for the petitioner, and was beginning to say that 'on his honor he believed his client's case to be well founded,' when the Lord Chief Justice interfered, and peremptorily said he 'could not allow the learned counsel to pledge his honor on his own belief. To do so were a violation of the rules of the profession, and a dishonor to counsel.' Dr. Smith apologized."¹



LORD KENYON, on the trial of Hadfield for firing a loaded pistol at the King when sitting in a box at the theatre of Drury Lane, told the jury, that, "if the scales hung any thing like even, it was their duty to throw in a certain proportion of mercy."

¹ The North American Review, April, 1871, p. 393.

ANY over-great penalty besides the acerbity of it, deadens the execution of the law. —
Lord Bacon.


—♦♦—

THE possession of stolen property *recently* after the commission of a theft is *primâ facie* evidence that the possessor was either the thief or the receiver, according to the other circumstances of the case; and this presumption, when unexplained either by direct evidence or by the character and habits of the possessor, or otherwise, is usually regarded by the jury as conclusive. This presumption, which in all cases is one of *fact* rather than of law, is occasionally so strong as to render unnecessary any direct proof of what is called *corpus delicti*.

Thus, to borrow an apt illustration from Mr. Justice Maule, if a man were to go into the London Docks quite sober, and shortly afterwards were found very drunk, staggering out of one of the cellars in which above a million gallons of wine are stored, “I think,” says the learned judge, — and most persons will probably agree with him, — “that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached, and that any wine had actually been missed.”¹

¹ Regina v. Burton, Dearsly C. C. 284.

IN 1692 William Bradford was tried before two Quaker judges for printing an obnoxious pamphlet. An amusing incident occurred at the trial. The Prosecution wished to prove that Bradford had printed the pamphlet, — a fact of which there was no legal evidence. He had taken care that no one should see him print it. Mr. Attorney brought in the *form*, already seized by him, on which the pamphlet had been printed. The discovery was received with exultation by the prosecuting party. Bradford contended rightly that the *form* was no proof against him until they had shown that he had printed from it. Still it was put as proof before the jury. Unable, however, to read the matter from the types, without looking at them closely, the foreman began to press the chase along the panel. Of a sudden the *quoins* got loose, and the mass of type fell through, a pile of indecipherable *pi*! The evidence had disappeared by magic.¹



THE keeper of the jail in Oxford having in his custody one Alice de Droys, condemned for felony, and reprieved for pregnancy, suffered her to go abroad under the guard of a servant. She making her escape, the master was saved by benefit of clergy; but the servant was hanged.²

¹ Mr. J. W. Wallace's Bradford Address, pp. 56, 57.

² Kennett's Paroch. Antiq. vol. I. p. 234.

IN 1841, relative to the trial of Warren Hastings, Lord Macaulay wrote: "The result ceased to be matter of doubt from the time when the Lords resolved that they would be guided by the rules of evidence which are received in the inferior courts of the realm. Those rules, it is well known, exclude much information which would be quite sufficient to determine the conduct of any reasonable man in the most important transactions of private life. These rules, at every assizes, save scores of culprits whom judges, jury, and spectators firmly believe to be guilty. But when those rules were rigidly applied to offences committed many years before, at the distance of many thousands of miles, conviction was of course out of the question. We do not blame the accused and his counsel for availing themselves of every legal advantage in order to obtain an acquittal; but it is clear that an acquittal so obtained cannot be pleaded in bar of the judgment of history."



THE Statute of Merton, so called because the Parliament or Council sat at the Priory of Merton in Surrey, was passed in the twentieth year of the reign of Henry III. A.D. 1236. It is a remarkable fact that women were summoned to this council.¹

¹ Spilsbury's *Lincoln's Inn and Library*, pp. 200, 201.

IN the very heart of all legal formality and technicality,—the Statutes at Large,—some funny things may be found. The best that now occurs to the memory is not to be brought to book, and must be given as a tradition of the time when George III. was King. Its tenor is, that a bill which proposed, as the punishment of an offence, to levy a certain pecuniary penalty, one half thereof to go to his Majesty, and the other half to the informer, was altered in committee, in so far that when it appeared in the form of an Act, *the punishment* was changed to whipping and imprisonment, *the destination* being left unaltered.



ONE day at dinner, Curran sat opposite Lord Norbury, who was famous for his severity as a judge. “Curran,” asked Norbury, “is that hung beef before you?” — “You try it, my Lord,” answered Curran, “and it’s sure to be.”



“WHY, L., your office is as hot as an oven,” said a client. “So it ought to be,” replied the lawyer: “*I make my bread here.*”



“AS right signifieth law, so tort, crooked or wrong, signifieth injury.” — 2 Inst. 56.

HERE is a brief extract from a law-paper, for the full understanding of which it has to be kept in view that the pleader, being an officer of the law who has been prevented from executing his warrant by threats, is required, as a matter of form, to swear that he was really afraid that the threats would be carried into execution.

“Farther depones that the said A. B. said, that, if deponent did not immediately take himself off, he would pitch him (the deponent) down stairs; which the deponent verily believes he would have done.

“Farther depones, that, time and place aforesaid, the said A. B. said to deponent, ‘If you come another step nearer, I’ll kick you to hell;’ which the deponent verily believes he would have done.”



“LET this be the method of taking down judgments, and committing them to writing,” says Lord Bacon. “Record the cases precisely, the judgments themselves word for word; add the reasons which the judges allege for their judgments; do not mix up the authority of cases brought forward as examples with the principal case; and omit the perorations of counsel, *unless they contain something very remarkable.*”¹

¹ De Augmentis, bk. VIII. aph. 74, vol. V. p. 104, ed. Spedding.

ARUNDINES CAMI. This beautifully printed volume consists of Greek and Latin translations, chiefly from the English poets, most of which are translated with exquisite skill. Here is a specimen:—

LAW AND EQUITY.

Law and Equity are two things which God has joined, but which man has put asunder. — *Colton*.

JUS INJURIA.

Justitiam Numen junxit cum Lege; sed eheu!
Quas junxit Numen, dissociavit Homo.



IN COMMONWEALTH v. MERRIAM, 14 Pick. 518, which was an indictment for adultery, it was held that other instances of improper familiarity between the defendant and the same woman might be given in evidence to corroborate the witness. But such evidence is rejected, the Court say, “where it tends to show a *substantial act* of adultery on a different occasion.”¹



AN Irish crier being ordered to clear the court did so by this announcement: “Now, then, all ye *blackguards* that isn’t *lawyers*, must lave the coort.”

¹ Thayer v. Thayer, 101 Mass. 112.

IN Walpole's "Noble Authors" is recorded an anecdote of the third Earl of Shaftesbury. Attempting to speak on the bill for granting counsel to prisoners in cases of high treason, he was confounded, and for some time could not proceed; but recovering himself, he said: "What now happened to him would serve to fortify the arguments for the bill — if he, innocent, and pleading for others, was daunted at the augustness of such an assembly, what must a man be who should plead before them for his life?"



WHEN Sir Thomas More was Lord Chancellor, he enjoined a gentleman to pay a good round sum of money unto a poor widow whom he had oppressed; and the gentleman said: "Then I do hope your lordship will give me a good long day to pay it." — "You shall have your request," said Sir Thomas. "Monday next is St. Barnabas Day, the longest day in all the year: pay her then, or else you shall kiss the Fleet."¹



IN 1838 the vulgar error that an innkeeper might detain the person of his guest until payment of his bill, was exploded by the case of *Sunbolf v. Alford*, 3 M. & W. 248.

¹ Camden's *Britannia*, p. 399, ed. 1870.

IN a case in the Year Books, 22 & 23 Edward I. p. 448, a counsel makes a very apposite Scriptural quotation. Metingham, Chief Justice, says : “ If my vilein beget a child on my land, which is vileinage, and the child so begotten go out of the limits of my land, and six or seven or more years afterwards return to the same land, and I find him in his own nest at his own hearth, I can take him and tax him as my vilein ; for the reason that his return brings him to the same condition as he was in when he went.” Heiham of counsel responds : “ He fell into the pit which he hath digged.”



THE defendant charged the plaintiff with having attempted to burn the defendant's house. Wray, C. J., held that the words were actionable, assigning generally as the reason, that “ by such speech the plaintiff's good name is impaired.”¹



AN Irishman swearing the peace against his three sons thus concluded his affidavit : “ And this deponent further saith, that the only one of his children who showed him any real filial affection was his youngest son Larry, for he *never struck him when he was down.*”

¹ Edwards' Case, Cro. Eliz. 6.

ON the trial of Spencer Cowper for murder, A.D. 1699,¹ Dr. Crell, a physician, in the course of his testimony, addressing the Court, Baron Hatsell said: —

“Now, I will give you the opinion of several ancient authors.”

BARON HATSELL. — “Tell us your own observations.”

DR. CRELL. — “It must be reading, as well as a man’s own experience, that will make any one a physician; for without the reading of books of that art, the art itself cannot be attained to; besides, I humbly conceive that in such a difficult case as this we ought to have a great deference for the reports and opinions of learned men. Neither do I see any reason why I should not quote the fathers of my profession in this case as well as you gentlemen of the long robe quote Coke upon Littleton in others.”



IN Jenkins’s Centuries it is said: “A, a woman of twelve years of age, marries B, of thirteen years of age; A. has issue; this is a bastard in our law. Yet some write that Solomon begat Rehoboam at ten years of age, by computation of time out of the Scriptures.”²

¹ 13 Howell State Trials, 1163.

² Cent. VII. Cas. 26. See also Cent. II. Cas. 81, citing Year Book, 1 Henry VI. 3.

AT a sitting of the Dublin Court of Exchequer, Baron Richards found it necessary to administer a rebuke to Mr. Whiteside, Solicitor General. Mr. Whiteside demanded in a declamatory manner, and in an unusual style, that the Court should give its reasons for the course taken in the case, and expressed regret that there was no appeal from its decision. Baron Richards said he had too much reliance upon the gentlemen of the bar to fear that such a style of addressing the Court would be adopted as a precedent. "Mr. Whiteside has referred to the performance of my duty as a commissioner in the Incumbered Estates Court," said the judge; "he has no right to inflict upon me the odium of his panegyric. I disclaim his comment, and reject his praise."



FULBECK gives the following quaint definition of arrest: "Arrestare is, by the authority or warrant of the law, to hinder that either a man or his goods be at his own liberty, until the law be satisfied."



"I APPREHEND," said Mr. Justice Cresswell, "that where in our law Reports we find the expression 'public policy,' it is used somewhat inaccurately, instead of 'the policy of the law.'"¹

¹ 4 House of Lord Cases, p. 87.

IN Lord Campbell's "Lives of the Chancellors" ¹ the following passage occurs in the account of the trial of Sir Thomas More: "The jury, biassed as they were, seeing that if they credited all the evidence, there was not the shadow of a case against the prisoner, were about to acquit him; the judges were in dismay, the Attorney General stood aghast, when Mr. Solicitor, to his eternal disgrace and to the eternal disgrace of the Court who permitted such an outrage on decency, left the bar, and presented himself as a witness for the Crown. Being sworn, he detailed the confidential conversation he had had with the prisoner in the Tower on the occasion of the removal of the books."



IN Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50, it is stated, that, by the law of Mohammed, a woman could not be convicted of adultery unless on the testimony of *four male* witnesses: and his successor, the Caliph Omar, decided, with reference to this law, that all circumstantial evidence, however proximate and convincing, was of no avail, and that the four male witnesses must have witnessed the very act in the strictest sense of the word. This is one extreme. For the opposite the reader is referred to the case of Commonwealth v. Merriam, 14 Pick. 518.

¹ Vol. II. p. 61, 4th ed. quoted in 1 Cush. 520 note.

THERE are very many cases of murder more venial than many cases of manslaughter. A slaps B in the face, B stabs him: this is manslaughter. A shoots at a fowl, intending to steal it; one grain of shot hits B, who dies of lock-jaw a month after: this is murder. The fowl, instead of a hen, is a wild partridge: it is manslaughter. A, B, C, D, and E are stealing apples; F, the owner of the tree, collars A, who resists. B, C, D, and E throw stones at him, and the stone thrown by D kills him: this is murder in all five. A has reason to think that B has seduced his wife; runs home, finds some evidence (though not conclusive evidence) of the fact, and stabs B: this is "manslaughter of the lowest degree."¹



IN the "Epistle Dedicatory" to the book entitled "Some Considerations Touching the Style of the Holy Scriptures," by the Honorable Robert Boyle, Esq. 4to, 1675, we read as follows: "It is not always so despicable a piece of service as may be imagined to endear by particular considerations an excellent book to a person capable of discovering and making use of the rare things it contains. To which purpose I might offer you diverse more serious instances, but shall only at

¹ Per Watson B. in *Regina v. Davies*, Liverpool Summer Assizes, 1857.

present (a little to divert you) take this occasion to tell you that Ben Jonson passionately complaining to a learned acquaintance of mine that a man of the long robe, whom his wit had raised to great dignities and power, had refused to grant him some very valuable thing he had begged of him, concluded with saying, with an upbraiding tone and gesture to my friend: ‘*Why, the ungrateful wretch knows very well, that, before he came to preferment, I was the man that made him relish Horace.*’ Surely this is very characteristic. Boyle’s ‘learned acquaintance’ was of course Selden, with whom he is known to have been intimately associated, and the man of the long robe ‘whose wit had raised him to great dignities and power,’ was no doubt Jonson’s old ally, Sir John Davies, the Lord Chief Justice.”

—•••—

“THE right to a trade-mark is a right closely resembling, though not exactly the same as, copyright.” — Per Lord Cranworth, 11 H. L. Cas. 533.

••••

“WHERE the rigor of law bordereth upon injustice, mercy should, if possible, interpose in the administration.”²

¹ Works of Ben Jonson, vol. I. p. ix. ed. Cunningham.

² Foster, Disc. Hom. 261, and Disc. High Treas. 181.

WHEN counsel were disputing sharply in the Dean of St. Asaph's case a piece of evidence, one of them saying, "We can prove this to be the prosecutor's letter," and the other retorting, "I beg leave to say you cannot, it is not evidence," Lord Kenyon interposed, with a sort of learned charm, "modus in rebus, there must be an end of things." These bits of classicality, sometimes as inapplicable as if they had been picked up at random from a dictionary of quotations, are amusingly caricatured in that miscellany of legal anecdotes, "Westminster Hall." The learned lord is there represented concluding an elaborate charge of the jury with the observation: "Having thus discharged your consciences, gentlemen, you may retire to your homes in peace, with the delightful consciousness of having performed your duties well, and may lay your heads upon your pillows and say, 'Aut Caesar aut nullus.'"

On another occasion, his lordship, wishing to illustrate in a strong manner the conclusiveness of some fact, ended by remarking: "It is as plain as the noses on your faces, — *Latet anguis in herbâ!*"¹



"IT often happens," said Chief Justice Chapman in a capital trial, "that experts can be found to testify to any theory, *however absurd.*"²

¹ Townsend's *Lives of Twelve Judges*, vol. I. pp. 78, 79.

² Trial of Samuel M. Andrews, p. 256.

IN the case of *Tynte v. The Queen*, 7 Q. B. 216, judgment was reversed on error, after a lapse of one hundred and sixteen years.¹



THE constant publication of cases in support of clear law is excessively tiresome, and irresistibly calls to mind the amusing colloquy in "*Much Ado About Nothing*:" —

DON PEDRO. — I think this is your daughter.

LEONATO. — Her mother hath many times told me so.

BENEDICK. — Were you in doubt, sir, that you asked her so often?

¹ This was a writ of error brought to reverse a judgment of outlawry against Philip, Duke of Wharton.

It appeared that the Duke of Wharton, by his will, made a few weeks before his death, and proved in the Prerogative Court of Dublin, Dec. 7, 1756, left all his goods, effects, and worldly substance, to the then duchess, his second wife, and ordered that the following inscriptions should be engraven on a stone, to be fixed upon his burial place, —

"Vixi, et quam dederat cursum fortuna peregi:"

"Thy fame shall live when pyramids of pride

Mix with the ashes they were raised to hide:"

thus exhibiting to the end of his life the "ruling passion," "lust of praise," by which Pope has characterized him in the *Epistle to Lord Cobham*. His treason against George the Second, a fact hardly important enough for history, is kept in remembrance by the "*Moral Essay*" of the satirist, and by the epigrammatic notice of Philip, Duke of Wharton, in Walpole's "*Catalogue of Royal and Noble Authors*."

THERE is a natural standing court within us, examining, acquitting, and condemning at the tribunal of ourselves, wherein iniquities have their natural thetas,¹ and no nocent² is absolved by the verdict of himself. And although our transgressions shall be tried at the last bar, the process need not be long; for the Judge of all knoweth all, and every man will nakedly know himself; and when so few are like to plead not guilty, the assize must soon have an end.³



A PRISONER being called on to plead an indictment for larceny was told by the clerk to hold up his right hand. The man immediately held up his left hand. "Hold up your *right* hand," said the clerk. "Please your Honor," said the culprit, still keeping up his left hand, "I am *left-handed*."



IN truth, as was said by Chief Justice Wilmot, "the common law is nothing else but statutes worn out."⁴

¹ A theta inscribed upon the judge's tessara, or ballot, was a mark for death, or capital condemnation.

² *Judice nemo nocens absolvitur.* — *Juv. Sat.* XIII. 2, 3.

³ Sir Thomas Browne, *Christian Morals*, vol. IV. pp. 69, 70, ed. Pickering.

⁴ *Collins v. Blantern*, 2 Wils. 341, quoted by Willes, J., in *Pickering v. Ilfracombe Railway Co.* L. R. 3 C. P. 250.

THE precise time when the system of reporting began cannot now be ascertained. Sir John Davies, in the preface to his Reports, thinks that although those in print and those scattered in the Abridgments were not found higher than the time of Henry III., “yet assuredly there were other Reports digested in years and terms as ancient as the time of King William the Conqueror.” He does not pretend to more than a conjecture; and when Chaucer, in the Prologue to the Canterbury Tales, says of the Sergeant, —

“In termés he case and domés all
That from the time of King William was fall,” —

it is not to be inferred that he vouches for the existence of Reports of such an early date: he is only magnifying the learning, and swelling the number of accomplishments, of the character which he is describing. The existence at any time of a continuous series of Reports from the time of the Conquest is not probable.¹



THE intrinsic weakness of hearsay evidence is one of the reasons why it is inadmissible.

Pluris est oculatus testis unus, quam auriti decem;
Qui audiunt, audita dicunt, qui vident, planè sciunt.

PLAUT. *Trucu.* act ii. sc. 6, ll. 8, 9.

¹ Preface Year Books, 30 & 31 Edward I. p. xvi.

IN the case of *Day v. Micon*, 18 Wallace, 156, the plaintiff in error claimed certain estate formerly owned by Hon. Judah P. Benjamin, and purchased at a sale under the confiscation act by Mr. Day, who argued his own cause before the Supreme Court of the United States. His original brief was in the ordinary form, presenting nothing unusual, perhaps, except the Greek verse with which it concluded. But before the cause came on for hearing, Mr. Day prepared a preliminary page, which he had bound up with his brief, in calf, in which he moved to strike out the opening sentence: "This is a writ of error to the Supreme Court of Louisiana," and substitute the following, which is literally copied, preserving capitals, italics, etc.:—

"MAY IT PLEASE THE COURT: When 'The Bonnie Blue Flag' went down before 'The Star Spangled Banner,' and that glorious emblem of 'The Union, the Constitution, and the Enforcement of the Laws' again waived in triumph

'From Maine's dark pines and crags of snow
To where magnolia breezes blow.'

it was fondly hoped that civil strife and contention were at an end, and that peace, quiet and repose had returned to bless the land. But these were

'Hopes which but allured to fly;'

they were, indeed, but

‘Joys that vanished while we sipp’d.’

For scarcely had the roar of artillery ceased, and the smoke of the battle cleared off, and scarcely had the ink become dry on the parchments of Pardon, which fell from the Executive hand

‘Thick as the autumnal leaves that strew the brooks
In Vallombrosa,’

before some

‘of the last few who, vainly have,’

and who would theoretically, merely,

‘Die for the cause they could not save,’

rushed into the Courts, renewed the contest in another form, and we are here to-day on a writ of error to the Supreme Court of Louisiana to reverse a victory obtained in this new mode of hostility and attack upon the power and authority of the United States, and the rights of one firmly based upon the same.”

After listening to so many of the plaintiff's ideas as the limited time allowed him to ventilate, the Court declined to hear argument from the defendant,¹ and affirmed the judgment of the Supreme Court of Louisiana.

¹ 18 Wallace, 160.

LORD ELDON once judicially observed that a certain distinction appeared to him "*to be too thin.*"¹



"TO give every man his due," wrote Lord Bacon, "had it not been for Sir Edward Coke's Reports (which though they may have errors, and some peremptory and extra-judicial resolutions more than are warranted, yet they contain infinite good decisions and rulings over of cases), the law by this time had been almost like a ship without ballast;² for that the cases of modern experience are fled from those that are adjudged and ruled in former time."³



LORD DENMAN, C. J., once said: "I remember an action tried before Gibbs, C. J., brought against Alderman Wood by a man whom he had sentenced to be imprisoned; and it was contended that the imprisonment was illegal, because the sentence did not also direct that he should be whipped." Gibbs, C. J., said to the jury: "Give the plaintiff the full damages he has sustained by reason of not having been whipped."⁴

¹ *Ex parte Kensington*, 2 V. & B. 79, 84, cited in 1 Jones on Mortgages, § 181 note.

² It has been said that the bulk of our ballast has now well nigh sunk the vessel of justice.

³ Bacon, Works, vol. XIII. p. 65, ed. Spedding.

⁴ *Whitehead v. The Queen*, 14 L. J. M. C. 166.

A VERY ugly old barrister, arguing a point of practice before Plunket, claimed to be received as an authority. "I am a pretty old practitioner, my lord." — "An *old* practitioner, Mr. S." was Plunket's correction.



WALPOLE, in his "Royal and Noble Authors," speaks of Lord Somers as "One of those divine men, who, like a chapel in a palace, remain unprofaned, while all the rest is tyranny, corruption, and folly."



THE classics illustrate and embellish the Commentaries of Kent. In vol. III. p. 234 note, is this passage: "Emerigon, I. 609, has beautifully illustrated, from Juvenal, the growth and progress of an irregular jettison, and that imminent danger and absorbing terror which justify it. At first the skill of the pilot fails: —

nullam prudentia cani
Rectoris conferret opem.

Catullus becomes restless with terror as the danger presses, and at last he cries: —

Fundite, quæ mea sunt, dicebat, cuncta, Catullus
Præcipitare volens etiam pulcherrima, vestem
Purpuream."

THE Term Reports, when they use the very language of Lord Kenyon, often contain a series of broken metaphors. For example: "If an individual can *break down* any of those safeguards which the Constitution has so wisely and so cautiously erected, by *poisoning* the minds of the jury at a time when they are called upon to decide, he will *stab* the administration of justice in its most vital parts."¹



AN Irishman was once brought up before a magistrate, charged with marrying six wives. The magistrate asked him how he could be so hardened a villain. "Please, your worship," says Paddy, "I was trying to *get a good one*."



A STRANGER to law-courts, hearing a judge call a sergeant "brother," expressed his surprise. "Oh!" said one present, "they are brothers, — *brothers-in-law*."



ONE witness, of his own knowledge, and another of hearsay from him, though at the third or fourth hand, are two sufficient witnesses in high treason.²

¹ Townsend's Lives of Twelve Judges, vol. I. p. 79.

² Marginal note to Thomas's Case, Dyer, 99 b, quoted in Phillimore Ev. 136.

LORD COKE, in half a page, on the subject of the Court of Chivalry, quotes extracts from Lucan, Tacitus, Seneca, Cicero, Sallust, Aristotle, Vegetius, Lipsius.¹ As a specimen of his quotation, in treating of the Courts of the Forest,² he writes: "And seeing we are to treat of game and hunting, let us (to the end we may proceed the more cheerfully) recreate ourselves with the excellent description of Dido; that Doe of the Forest, wounded with a deadly arrow stricken in her, and not impertinent to our purpose." He then quotes six lines, beginning, —

Uritur infelix Dido, totâque vagatus
Urbe furens, qualis coniecta cerva sagittâ, etc.



ACCURACY is the first duty of a reporter; clearness is another; brevity is also essential. To convey the fullest information in the least space is, therefore, one canon of reporting. To borrow the quaint language of Sydney Smith, the reporter "should think upon Noah and the ark, and be brief. The ark should constantly remind him of the little time there is left for reading; and he should learn, as they did in the ark, to crowd a great deal of matter into a very little space."

¹ He says, "to cite verses standeth well with the gravitie of our lawyers."

² 4 Inst. 289.

IT has been said of Blackstone's Commentaries, that they have been so often patched, that they will soon resemble Sir John Cutler's *silk* stockings, from which every particle of silk had been displaced by darnings of worsted.



A LEARNED judge being asked the difference between law and equity courts, replied: "At common law you are done for at once; at equity you are not so easily disposed of. One is *prussic acid*, and the other *laudanum*."



A CUNNING jurymen addressing the clerk of the court when administering the oath, said, "Speak up: I cannot hear what you say." — "Stop: are you deaf?" asked Baron Alderson. "Yes, of one ear." — "Then you may leave the box; for it is necessary that jurymen should hear *both sides*."



"WHEN a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter; for jealousy is the rage of a man, and adultery is the highest invasion of *property*."¹

¹ Regina v. Mawgridge, Kel. 137; 186, 3d ed.

SPECIMEN OF SCRIBLERUS'S REPORTS.

STRADLING v. STILES.¹

Le report del case argue en le commen banke devant
touts les justices de le mesime banke, en le quart.
An. du raygne de roy *Juques*, entre *Matthew Strad-*
ling, plant. & *Peter Stiles*, def. en un action propter
certos equos coloratos, *Anglicè*, pyed horses, post.
per le dit *Matthew* vers le dit *Peter*.

SIR JOHN SWALE, of Swale-Hall in
Swale-Dale fast by the River Swale, kt. Le récit del
Case.
made his last Will and Testament: in which, among
other Bequests was this, viz. Out of the kind love
and respect that I bear unto my much honoured
and good friend Mr. *Matthew Stradling*, gent. I do
bequeath unto the said *Matthew Stradling*, all my
black and white horses. The Testator had six black
horses, six whi c horses, and six pyed horses.

The Debate therefore was, Whether or no
the said *Matthew Stradling* should have Le point.
the said pyed horses by virtue of the said Bequest.

Atkins apprentice pour le pl. moy Pour le pl.
semble que le pl. recobera.

¹ The exquisite burlesque on the old Reports entitled "*Stradling v. Stiles*" is often erroneously attributed to Swift and Dr. Arbuthnot; but it seems really to have been the joint composition of Pope and Mr. Fortescue (afterwards in 1736 made a Baron of the Exchequer), and who was, says Sir Walter Scott, "*though a lawyer, a man of great humor, talents, and integrity.*" Swift, Works, vol. xiii. p. 158, ed. Scott.

And first of all it seemeth expedient to consider what is the nature of horses, and also what is the nature of colours: and so the argument will consequently divide itself in a twofold way, that is to say, the formal part, and substantial part. Horses are the substantial part, or thing bequeathed: black and white the formal or descriptive part.

Horse, in a physical sense, doth import a certain quadrupede or four-footed animal, which, by the apt and regular disposition of certain proper and convenient parts, is adapted, fitted, and constituted, for the use and need of man. ¶*¶*ra so necessary and conducive was this animal conceived to be to the behoof of the commonweal, that sundry and divers acts of Parliament have from time to time been made in favour of horses.

1st Edw. VI. Makes the transporting of horses out of the kingdom no less a penalty than the forfeiture of £40.

2nd and 3rd Edward VI. Takes from horse-stealers the benefit of their clergy.

And the statutes of the 27th and 32nd of Henry VIII. condescend so far as to take care of their very breed: These our wise ancestors prudently foreseeing, that they could not better take care of their own posterity, than by also taking care of that of their horses.

And of so great esteem are horses in the eye of the common law, that when a Knight of the Bath committeth any great and enormous crime, his punishment is to

have his spurs chopt off with a cleaver, being, as master Bracton well observeth, unworthy to ride on a horse.

Littleton, Sect. 315, saith, If tenants in common make a lease reserving for rent a horse, they shall have but one assize, because, saith the book, the law will not suffer a horse to be severed. Another argument of what high estimation the law maketh of an horse.

But as the great difference seemeth not to be so much touching the substantial part, horses, let us proceed to the formal or descriptive part, viz. what horses they are that come within this Bequest.

Colours are commonly of various kinds and different sorts; of which white and black are the two extremes, and consequently comprehend within them all other colours whatsoever.

By a bequest therefore of black and white horses, grey or pyed horses may well pass; for when two extremes, or remotest ends of any thing are devised, the law, by common intendment, will intend whatsoever is contained between them to be devised too.

But the present case is still stronger, coming not only within the intendment, but also the very letter of the words.

By the word black, all the horses that are black are devised; by the word white are devised those that are white; and by the same word, with the conjunction copulative, and, between them, the horses that are black and white, that is to say, pyed, are devised also.

Whatever is black and white is pyed, and whatever is pyed is black and white; *ergo*, black and white is pyed, and *vice versa*, pyed is black and white.

If therefore black and white horses are devised, pyed horses shall pass by such devise; but black and white horses are devised; *ergo*, the pl. shall have the pyed horses.

Catlyne Serjeant: may seemle al' contrary, the
 Pour le Defend. plaintiff shall not have the pyed horses by intendment; for if by the devise of black and white horses, not only black and white horses, but horses of any colour between these two extremes may pass, then not only pyed and grey horses, but also red and bay horses would pass likewise, which would be absurd, and against reason. And this is another strong argument in law. *Nihil, quod est contra rationem est licitum*; for reason is the life of the law, nay the common law is nothing but reason; which is to be understood of artificial perfection and reason gotten by long study, and not of man's natural reason; for *nemo nascitur artifex*, and legal reason *est summa ratio*; and therefore if all the reason that is dispersed into so many different heads, were united into one, he could not make such a law as the law of England; because by many successions of ages it has been fixed and refixed by grave and learned men; so that the old rule may be verified in it, *Neminem oportet esse legibus sapientiore*.

As therefore pyed horses do not come within the intendment of the bequest, so neither do they within the letter of the words.

A pyed horse is not a white horse; neither is a pyed a black horse; how then can pyed horses come under the words of black and white horses?

Besides, where custom hath adapted a certain determinate name to any one thing, in all devises, scotments and grants, that certain name shall be made use of, and no uncertain circumlocutory descriptions shall be allowed; for certainty is the father of right and the mother of justice.

Le rest del argument jeo ne pouvois oyer, car jeo fui disturb en mon place.

Le court fuit longement en doubt' de c'est matter; et apres grand deliberation eu,

Judgment fuit donne pour le pl. nisa causa.

Motion in arrest of judgment, that the pyed horses were mares; and thereupon an inspection was prayed.

Et sur ceo le court advisare vult.



WHEN Baron Martin was at the Bar, and addressing the Court of Exchequer in an insurance case, he was interrupted by Baron Alderson observing, "Mr. Martin, do you think any office would insure your life? Remember, yours is a *brief* existence."

ALBEIT beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, so long as he keepe himselfe in his own proper element. — Co. Litt. 71 a.



MR. JUSTICE GOULD was trying a case at York, and when he had proceeded for about two hours, he observed: “Here are only eleven jurymen in the box: where is the twelfth?” — “Please you, my lord,” said one of the eleven, “he has gone away about some other business; *but he has left his verdict with me!*”



MR. JUSTICE PUTNAM, in considering the subject of the conclusiveness of judgments, remarked, that, if the principle were otherwise, “The law would become a game of frauds, in which the greatest rogue would become the most successful player.”¹



“HURRAH! Hurrah!” cried a young lawyer who had succeeded to his father’s practice, “I’ve settled that old Chancery suit at last.” — “*Settled it!*” cried the astonished parent, “why, I gave you that as *an annuity* for your life.”

¹ M’Rae v. Mattoon, 13 Pick. 58.

“COSTS as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them.”¹



HENRY FOX, in a hot attack on Lord Chancellor Hardwicke, who was supposed to have no desire to reform the many abuses of his office, exclaimed: “Touch but a cobweb in Westminster Hall, and the old spider of the Law is out upon you with all his vermin at his heels.”²



THE person of Lord Ellesmere is described as remarkable for its venerable gravity, and many went to the Court of Chancery to see him in his “pomp and circumstance;” on which Fuller quaintly observes, “happy they who had no other business there!”



THE old English lawyers occasionally rejected the evidence of women on the ground that they are *frail*.³

¹ Per Bramwell, B., in *Harold v. Smith*, 5 H. & N. 385.

² *The North American Review*, July, 1851, p. 151.

³ *Best Ev.* § 61, citing *Fitzh. Abr. Villenage*, pl. 37. *Bro. Abr. Testmoignes*, pl. 30.

DISCRETIO est discernere per legem quid sit justum. — 4 Inst. 41.¹

— • • • —

THE case of *State v. Neely*, 74 N. C. 425, shows what evidence is sufficient in the opinion of the majority of the Court to convict a negro of an assault with attempt to commit a rape. The dissenting opinion of Mr. Justice Rodman is entertaining, and quite as convincing as that of the majority of the Court.

— • • • —

MAJUS dignum trahit ad se minus dignum. — 1 Inst. 43 b. An adulterer takes the wife of another man, and new clothes her; the husband may take with his wife the clothes on her back.²

— • • • —

IT is felony in the sheriff to behead one who was sentenced to be hanged.³

— • • • —

THE Almanac is part of the law of England.⁴

¹ Quoted by Tindal, C. J., in *Regina v. Darlington*, 6 Q. B. 700.

² Year Book, 11 Henry IV. 4. 31.

³ Year Book, 35 Henry VI. 58.

⁴ Per Pollock, C. B., in *Tutton v. Dark*, 5 H. & N. 647. 6 Mod. 41. 6 Mod. 81.

THE Commentary of Lord Coke upon Littleton will be admired, says Fuller, “by judicious posterity while Fame has a trumpet left her, and any breath to blow therein.”



BRITAIN v. KINNAIRD, 1 B. & B. 432.
“This case has come to be the locus classicus of Sir J. Richardson.”¹



IN a trial at the Newcastle assizes, before Mr. Justice Bayley against a blacksmith for a nuisance, the plaintiff's daughter, a sprightly girl, stated that the sparks came in at the window of her bedroom. Sergeant Hullock, in cross-examination, retorted: “Nay, where so pretty a girl is, don't they oftener come in at the door?”



SIR JAMES DYER, in his Reports, after stating the opinion of himself and some of his brothers, concludes, not very urbanely: “But Baldwin was of a contrary opinion; though neither I, nor any one else, I believe, understood his refutation.”²

¹ Per Lord Coleridge, C. J., in *Usill v. Hales*, 47 L. J. C. P. 326.

² 1 Dyer, 43 a.

WE will conclude this volume with a single Pensée from Joubert:—

Only just the right quantum of wit should be put into a book: in conversation, a little excess is allowable. “And for a farewell to our jurisprudent,” in the language of Lord Coke, “I wish unto him the gladsome light of jurisprudence, the loveliness of temperance, the stabilitie of fortitude, and the soliditie of justice.”





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